Supreme Court, U.S.
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DOCKET NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

United States

Respondent

v.

Pedro Jose Hernandez, a/k/a Juan Pedro, a/k/a Pedro Jose

Petitioner

On Petition For Writ Of Certiorari
To The
United States Court Of Appeals For The First Circuit

Petition For Writ Of Certiorari

Michael A. Tucker
Counsel of Record For Petitioner
Griffin & Tucker, P.C.
24R Pleasant Street
Newburyport, MA 01950
(978) 465-3590

Question Presented:

Whether Pedro Jose Hernandez's sentence should be remanded for reconsideration in light of this Court's ruling in United States v. Booker?

TABLE OF CONTENTS

Question Presented..... i

Table of Contents..... ii

Table of Authorities..... iii

Petition for a Writ of Certiorari..... 1

Opinions Below..... 1

Statement of Jurisdiction.....1

Constitutional and Statutory Provisions Involved..... 2

Statement of the Case.....2

Reason for Granting the Writ.....4

Conclusion.....9

Appendix (separately bound)

TABLE OF AUTHORITIES

Anders v. California, 386 U.S. 738, (1967).....1, 3

Apprendi v. New Jersey; 530 U.S. 466,
120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000).....1, 4, 5, 7

Blakely v. Washington; 542 U.S. ___,
124 S. Ct. 2531. 159 L. Ed. 2d 403 (2004).....4, 5, 7

U.S. v. Antonakopoulos;
399 F.3d 68 (1st Cir. 2005).....5, 6, 7, 8

U.S. v. Booker; 543 U.S. ___,
125 S. Ct. 738; 160 L.Ed. 2d 621 (2005..... 1, 4, 5, 6, 7, 8

U.S. v. Dominguez Benitez, 542 U.S. 74,
124 S. Ct. 2333, 159 L. Ed. 2d 157 (2004).....6

U.S. v Melendez-Santana, 353 F. 3d 93, (1st Cir. 2003)....1, 4

U.S. v. Olano, 507 U.S. 725,
731-732, 123 L. Ed. 2d 508, 113 S. Ct. 1770 (1993).....6, 7

U.S. v. Yates, 973 F.2d 1 (1st Cir.1993)..... 2

18 U.S.C. § 3553(a) and (b)..... 2, 4, Appendix

81 U.S.C. § 3742(e)..... 2, 4, Appendix

28 U.S.C. § 1254..... 2

28 U.S.C. §1291..... 1

Petition for a Writ of Certiorari

Petitioner, Pedro Jose Hernandez, respectfully prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the First Circuit in this case. As a result of this court's recent ruling in United States v. Booker; 125 S. Ct. 738; 160 L.Ed. 2d 621, the Federal Sentencing Guidelines have been held to be discretionary with respect to sentencing judges. In the case at bar, Judge Lasker indicated that he would have reached a different result had he not been bound by them. Therefore the judgment in this case is reviewed in light of this Court's recent decision that the guidelines are advisory and not mandatory.

Opinions Below

The opinion of the First Circuit Court of Appeals has not been reported. The opinion of the United States District Court for the District of Massachusetts court has not been reported.[1]

Statement of Jurisdiction

The judgment in this case was first entered by the United States District Court for the District of Massachusetts on August 29, 2002. An appeal was filed with the United States Court of Appeals for the First Circuit pursuant to its appellate jurisdiction under 28 U.S.C. §1291. A brief on appeal was filed pursuant to Anders v California, 386 U.S. 738, (1967) The court remanded the case to the United States District Court pursuant to U.S. v Melendez-Santana, 353 F3d 93, (2003) Judgment entered on January 19, 2005. Final

[1] Copies of both judgments are included in the appendix to this petition.

Judgment entered on January 19, 2005. This case now falls within the jurisdiction of the United States Supreme Court pursuant to 28 U.S.C. § 1254.

Constitutional and Statutory Provisions Involved

The constitutional and statutory provisions involved in this case are as follows:

1) 21 U.S.C. § 963 which provides that: "Any person who attempts or conspires to commit any offense defined in this title shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy."

2) 18 U.S.C. § 3553 (a) and (b). Pursuant to Supreme Court Rule 14(f) please see Appendix for full text.

3) 18 U.S.C. § 3742(e). Pursuant to Supreme Court Rule 14(f) please see Appendix for full text.

Statement of the Case

This case was prosecuted in the United States District Court for the District of Massachusetts. The appellate record is drawn from the Transcripts of the plea and sentencing hearings as well as motions and pleadings docketed in the District Court. [2] U.S. v. Yates, 973 F.2d 1 (1st Cir.1993).

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[2] References to the Sentencing Transcript are hereinafter referred to as "ST", followed by the page and line number. The transcript is included in the accompanying Appendix.

Pedro Jose Hernandez (Defendant at trial level, hereinafter "Petitioner") was convicted of: One count of Conspiracy to Import Heroin (21 U.S.C. § 963).

The appellant in the case at bar tendered a change of plea on November 27, 2001. This hearing was subsequent to two status hearings and a detention hearing during which the consequences of a tender of plea were discussed. The defendant, by and through his attorney, requested a Pre Sentence Investigation report, which was produced. The final change of plea hearing was held before Judge Lasker on November 27, 2001.

A final plea colloquy was held pursuant to Federal Rules of Criminal Procedure, Rule 11, and Mr. Hernandez was informed by the court of the consequences of his tender and the benefits he received in return for his waivers. Mr. Hernandez and his counsel conferred and Mr. Hernandez indicated that he understood and accepted the terms and conditions of his tender.

The sentencing Judge, Morris E. Lasker, sentenced Mr. Hernandez to 100 months imprisonment. (ST page 16). However, at numerous times during the sentencing hearing Judge Lasker indicated that he felt constrained by the Federal Sentencing Guidelines despite facts and circumstances of the case including the fact that despite only being peripherally involved, Mr. Hernandez was a "career offender" and had to be treated as such under the Guidelines. (ST page 11, lines 15-18; page 12, lines 6-10; page 15, line 15 to page 16, line 12.) The judgment was entered on August 29, 2002.

A Notice of Appeal was then filed with the United States Court of Appeals for the First Circuit on September 4, 2002. A brief pursuant to Anders v California, 386 U.S. 738, (1967) was filed in this matter on August 28, 2003. That brief was

denied and an order of the court for further briefing of this matter entered March 22, 2004.

A brief was then filed pursuant to the First Circuit Court of Appeals decision in U.S. v Melendez-Santana, 353 F3d 93, (2003) regarding the drug testing requirements of supervised release. On January 19, 2005 the First Circuit Court of Appeals entered its judgment which modified and affirmed Mr. Hernandez's sentence.

On January 12, 2005 this court handed down its decision in United States v. Booker; 125 S. Ct. 738; 160 L.Ed. 2d 621 striking the language which made the Federal Sentencing Guidelines mandatory.

Reason for Granting the Writ

Mr. Hernandez's petition for writ of certiorari should be granted in light of this court's ruling in U.S. v. Booker 125 S. Ct. 738 and the probability that he would have received a more favorable sentence under the advisory application of the Federal Sentencing Guidelines.

This court's recent decision in U.S. v. Booker struck certain language in the Federal Sentencing Guidelines ("Guidelines") which previously made the Guidelines mandatory for sentencing judges. 543 U.S. ___, 125 S. Ct. 738; 160 L. Ed. 2d 621. In Booker this court answered the question of whether its prior decisions in Blakely v. Washington and Apprendi v. New Jersey would be applicable to the federal Guidelines. Blakely v. Washington; 542 U.S. ___, 124 S. Ct. 2531. 159 L. Ed. 2d 403 (2004) and Apprendi v. New Jersey; 530 U.S. 466,120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). In both cases this court held that provisions of state criminal sentencing statutes which allowed a judge to issue a sentence exceeding the maximum prescribed based on

factual determinations, other than a prior conviction, which had not been proven to a jury beyond a reasonable doubt, or admitted to in a guilty plea, violated a defendant's rights under the Sixth Amendment of the federal constitution. *Id.* While clearly holding the state provisions violated the Sixth Amendment, these cases deliberately left open the question of whether similar provisions in the Guidelines also violated the Sixth Amendment because the federal guidelines were not at issue at the time. Blakely, 124 S. Ct. at 2538 and Apprendi, 530 U.S. at 466, 120 S. Ct. at 2348. In Booker, the federal guidelines were at issue and this court determined that as written, they contained similar violations of the Sixth Amendment of the Federal Constitution. Booker; 125 S. Ct. at 756-757. Rather than completely invalidating the Guidelines as unconstitutional this court struck the offending provisions 18 U.S.C. § 3553(b)(1) which made the Guidelines mandatory and 18 U.S.C. § 3742(e) which depended on the mandatory nature of the guidelines, thus eliminating the portions of the Guidelines which offended the Sixth Amendment. *Id.* Consequently, the Guidelines are now advisory in nature, setting forth factors a judge should consider and suggesting sentencing ranges but giving a judge discretion in their exercise. *Id.* The ruling was applicable to all cases pending on direct review or not yet final. *Id* at 769. Reviewing courts are expected to apply ordinary prudential doctrines such as whether the issue was raised below and the plain-error test, or harmless error (where there has been no Sixth Amendment violation) in determining whether to remand a sentence for reconsideration or to review it for reasonableness. *Id.*

The First Circuit first addressed Booker in U.S. v. Antonakopoulos and has applied the plain-error doctrine where there has been a Booker error but it has not been preserved below.[3] 399 F.3d 68, 75 (1st Cir. 2005) citing

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[3] According to this circuit's interpretation of Booker, a Booker error has occurred where a sentencing court imposed its sentence under the previously mandatory Guidelines, although the issue may have been

Booker, 125 S. Ct. at 769 and the plain-error test as set forth in United States v. Olano, 507 U.S. 725, 731-732, 123 L. Ed. 2d 508, 113 S. Ct. 1770 (1993). Under Olano, the four prongs of the plain-error test are as follows:

1) that an error exists;
2) that the error was plain at the time of the appeal;
3) that the error affected the defendant's substantial rights;
4) the error would impair confidence in the justice of the proceedings. Antonakopoulos at 77 and Olano 507 U.S. at 732.

The First Circuit, in accordance with all other circuits, has determined that the first two prongs are met (if the issue was not preserved below) whenever a sentence has been imposed under the mandatory Guidelines system. Antonakopoulos at 77. It has also determined that application of this court's decision applying the third and fourth prongs of the plain error test to a *Rule 11* claim in United States v. Dominguez Benitez, 124 S. Ct. 2333, 159 L. Ed. 2d 157, 542 U.S. 74 (2004) is appropriate for Booker issues. In order to meet these other two prongs of the test, the First Circuit has determined that the defendant must point to circumstances creating a "reasonable probability" that the defendant would receive a more favorable sentence under the new advisory Guidelines. Antonakopoulos at 78.

The court then explains examples of situations where the test might be met, citing cases wherein there is evidence of aggravating or mitigating circumstances not available for consideration under the mandatory application of the Guidelines or where there is evident that the trial judge felt the Guidelines imposed unfair sentences or indicated he might otherwise have sentenced differently. Antonakopoulos

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preserved below with an argument of Sixth Amendment violations under Apprendi or Blakely. Antonakopoulos at 75.

at 81-82 and the cases cited therein. In this particular case, the defendant, Antonkopoulos failed to even raise such an issue but had sought a downward departure from his sentence based on special family circumstances and therefore permitted him the opportunity to file a supplement brief in accordance with the decision herein.

The facts in the case at bar are in exact accordance with the types of cases in which the First Circuit believes this court's ruling in Booker are meant to apply. The judgment of the United States District Court for the District of Massachusetts was handed down by a judge who imposed sentence under the former mandatory scheme of the Guidelines. Although the issue was not preserved below under an Apprendi or Blakely argument, this is sufficient to meet the first to prongs of the plain-error test as adopted and applied by the First Circuit to Booker claims in Antonakopoulos. Antonakopoulos at 77.

In addition, the petitioner in the case at bar can satisfy the remaining two prongs of the plain-error test; that the error affected the defendant's substantial rights and that the error would impair confidence in the justice of the proceedings; as there are facts in his case which indicate a "reasonable probability" that he would have received a more favorable sentence if the judge were not bound by the Guidelines. Antonakopoulos at 77 and Olano 507 U.S. at 732. The petitioner's case is very similar to those cited by the court in Antonakopoulos as those which should be reconsidered in light of Booker because the judge here has indicated that he felt the Guidelines often impose sentences that are too high and might have issued a lesser sentence but for their mandatory nature. Antonakopoulos at 81-82 and cases cited therein. Several times during the sentencing hearing, the sentencing judge, Judge Lasker expressed precisely that sentiment.

In response to counsel's argument that the petitioner will likely receive a higher sentence than Judge Lasker had imposed on the primary actors in the conspiracy as a result of his "career offender" classification under the Guidelines the judge admitted the likely result and said the following:

"...I think that some of the sentences proposed by the guidelines are much too high, but I do believe the principle that a repeat offender has to be treated with that in mind. That is one of the problems for me." ST page 12, lines 6-10.

And again, when handing down the sentence, after hearing the petitioner's common law wife describe their family circumstances and the petitioner himself speak of his passive role and the fact that he received no money from the conspiracy and would eventually be deported anyway, Judge Lasker said:

"...I've been thinking about it a long time, and I was glad to hear what your wife had to say, and I wish that I was entirely free to do what you're asking, but I am not entirely free just to say God bless you, you can go home. I'm bound by what they call sentencing guidelines, which say that I must sentence you within certain parameters" and then later references the particular issue of his career offender status as one of the problems. ST page 15, line 15 to page 16, line 12.

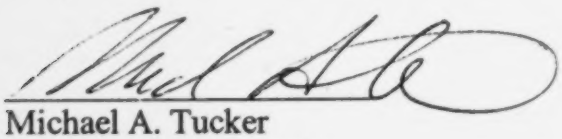
Therefore it certainly seems "reasonably probable" that this judge, given the freedom to consider some of the aggravating and mitigating circumstances and his disagreement with some of the formerly mandatory provisions of the Guidelines, that the petitioner would receive a more favorable sentence under the new advisory application of the Guidelines. The sentence imposed in the petitioner's case is exactly the type entitled to review in light of this court's ruling in Booker and the First Circuit's application thereof as applied in Antonakopoulos. The

petitioner therefore respectfully submits this petition for a writ of certiorari to the United States First Circuit Court of Appeals in order to obtain such review.

Conclusion

In light of the argument set forth above, this petition for a writ of certiorari should be granted.

Respectfully Submitted,



Michael A. Tucker
Griffin & Tucker, P.C.
24R Pleasant Street
Newburyport, MA 01950
(978)-465-3590
Counsel of Record for Petitioner

(2) Supreme Court, U.S.
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United States

Respondent

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Pedro Jose Hernandez, a/k/a Juan Pedro, a/k/a Pedro Jose

Petitioner

On Petition For Writ Of Certiorari
To The
United States Court Of Appeals For The First Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORI
Volume 1 of 2

Michael A. Tucker
Counsel of Record For Petitioner
Griffin & Tucker, P.C.
24R Pleasant Street
Newburyport, MA 01950
(978) 465-3590

APPENDIX TABLE OF CONTENTS

Volume 1 Contains:

A1. Presentence Report..... 1

Volume 2 Contains:

A2. Sentencing Transcript of the United States District Court for the District of Massachusetts..... 55

A3. Judgment of the United States District Court for the District of Massachusetts.....75

A4. Judgment of the United States Court of Appeals for the First Circuit.....86

A5. Relevant Provisions of 18 U.S.C. § 3553 (a) and (b).....89

A6. Relevant Provisions of 18 U.S.C. § 3742(e).....96

A7. Rule 11 Hearing of United States District Court for the District of Massachusetts.....99

A1

Presentence Report
United States v. Pedro Jose Hernandez
Docket No. 01-10013
Prepared for the United States District Court for the District of Massachusetts
Prepared January 10, 2002
Revised February 7, 2002

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA
vs.
Pedro Jose Hernandez
(a/k/a Porfirio Diaz, Victor Rincon, Porfirio Guzman)

Docket No. 01-10013
Defendant No. 3

PRESENTENCE REPORT

Prepared for: Honorable Morris E. Lasker, U.S District Court Judge
Prepared by: Nicole F. Barrasso, U.S. Probation Officer
Sentencing Date: 2/14/02 Office Location: Boston
Offense: Pleaded Guilty

CTS:	Title & Section:	Charges:
1	21 U.S.C. § 963	Conspiracy to Import Heroin

Date Offense Concluded: 8/26/99
Counts to be Dismissed: None
Date of Arraignment: 2/1/01
Custodial Status: Detained since 2/5/01.
Date of Birth: 10/4/71 Age: 30 Dependents: 2
Citizenship:Dominican Republic Sex: Male
FBI No.: 313691MA2
SSN: unknown, possibly 347-64-2519 Race: Black/Hispanic
Other ID No.: A093324224

Education: 5 yrs. (unv.) U.S. Marshal No.: 23517-038
Residence Address: Plymouth County House of Correction
26 Long Pond Road
Plymouth, MA 02360
Mailing Address: Same.
Detainers: INS New York Parole Warrant
Codefendants: Jesus Hernandez, Isidro Hernandez, Daniel DelRosario, Juan Espinal

Assistant U.S. Attorney	Defense Counsel
Susan Poswistilo	Richard M. Welsh
617-748-3100	80 Worcester Street
	Grafton, MA 01530
	508-839-7713
	(Appointed)

Date report prepared: 1/10/02 Mandatory Minimum ~
Revised: 2/7/02

PART A. THE OFFENSE

Charges and Convictions

(A) On January 11, 2001, a grand jury sitting in U.S. District Court in Boston, Massachusetts returned a sealed, one-countIndictment charging Jesus Hernandez, Isidro Hernandez, "Pedro Jose" LNU, **a/k/a "Juan Pedro",** Daniel Delrosario, a/k/a "Eduardo Morales," a/k/a "Pipa," and Juan Espinal with Conspiracy to Import Heroin, in violation of 21 U.S.C. § 963.

(B) Count One of the Indictment charges that from in or around July 1999, and continuing until on or about August

26, 1999, at Lynn, Lawrence, and elsewhere in the District of Massachusetts, and elsewhere in the United States, the defendants knowingly and intentionally combined, conspired, and agreed together, and with persons known and unknown to the Grand Jury, to import a Schedule I controlled substance, to wit: heroin, into the United States from a place outside thereof, in violation of 21 U.S.C. § 952 (a) , all in violation of 21 U.S.C. § 963.

(C) On January 12, 2001, arrest warrants for the defendants issued.

(D) On January 29, 2001, the defendant, who was being held in state custody, made an initial appearance without counsel in U.S. District Court in Boston, Massachusetts before U.S. Magistrate Judge Judith G. Dein, who scheduled a detention hearing for February 1, 2001 and ordered that counsel be appointed for the defendant.

(E) On February 1, 2001, the defendant was arraigned in U.S. District Court in Boston, Massachusetts by Chief U.S. Magistrate Judge Joyce L. Alexander, who ruled that since the defendant was being held in state custody, a detention hearing would not be held until necessary. On February 5, 2001, Magistrate Judge Alexander ordered that the defendant be detained.

(F) On September 26, 2001, the defendant appeared in U.S. District Court in Boston, Massachusetts for a detention hearing before Magistrate Judge Alexander. The defendant then waived the detention hearing and consented to voluntary detention.

(G) On November 27, 2001, the defendant appeared in U.S. DistrictCourt in Boston, Massachusetts and entered a guilty plea to the Indictment before U.S. District Court Judge Morris E. Lasker, who accepted the plea and scheduled disposition for February 14, 2002.

Codefendants

(H) Jesus Hernandez: Case is pending; Jesus Hernandez remains a fugitive.

(I) Isidro Hernandez: On December 6, 2001, Isidro Hernandez waived Indictment and pled guilty to a one-count Superseding Information charging him with Importation of Heroin, in violation of 21 U.S.C. § 960(a). Disposition is scheduled for February 26, 2002.

(J) Daniel Delrosario: On September 19, 2001, Delrosario pled (j^7) guilty to the Indictment. Disposition is scheduled for March 20,2002.

(K) Juan Espinal: On December 7, 2001, Espinal pled guilty to the Indictment. Disposition is scheduled for February 27, 2002.

Related Cases

(L) None.

Plea Agreement

(M) The Rule 11(e) (1) (B) plea agreement is attached hereto.

Offense Conduct

(1) On December 21, 2001, Assistant U.S. Attorney Susan Poswistilo submitted the following statement of facts:

(2) In approximately December 1998, Betty Ann Rodriquez ("Rodriquez") attended a party at the residence of codefendant, Daniel DelRosario ("DelRosario"). At that time, Rodriquez met Pedro Jose **Hernandez ("Pedro Jose")** and Jesus Hernandez ("Jesus"), who were also attending the party. DelRosario told Rodriquez that he was intending to make a trip to Ecuador to carry heroin back to the United

States.

(3) In March 1999, Rodriquez spoke again to DelRosario. During that conversation, DelRosario told Rodriquez that a couple of people had come back from Ecuador, and that these individuals had made it back safely, without being arrested. DelRosario told Rodriquez that these individuals had swallowed the heroin in order to carry it back.

(4) Based upon statements made by Christobal DelRosario(hereinafter "Christobal") , in approximately late February or earlyMarch 1999, Christobal was asked by Pedro Jose, Jesus, and a third individual known as "Nino," to take a trip to Ecuador for the purpose of bringing back drugs. Christobal made the trip to Ecuador in March 1999.

(5) Prior to the trip, Christobal met with Jesus, Pedro Jose and Nino outside his home. Jesus gave Christobal a baby carrot and told him to swallow it whole, in order to see if he could swallow the heroin pellets. Christobal successfully passed the test, and Jesus and Pedro **Jose** told Christobal that they wanted him to go. Christobal went with Jesus, Pedro **Jose** and Nino to a travel agency to purchase the ticket.

(6) The day before he was scheduled to leave, Christobal received a telephone call from defendant Isidro Hernandez ("Isidro") , who told him the time that Jesus would pick him up to go to the airport. The next morning, Jesus, Pedro Jose and Nino drove Christobal from Lawrence to Jesus's apartment in Connecticut. Because the plane did not leave until that evening, Christobal spent the day with Isidro, his girlfriend, Jesus, Pedro Jose and others.

(7) Isidro, Jesus, Pedro Jose and Nino then drove Christobal to the airport. Before arriving there, Jesus gave Christbbal approximately $10,000 in cash, and told him someone would pick it up. In fact, Christobal would return

the money to Jesus when they met up in Ecuador.

(8) Christobal remained in Ecuador for over one week, meeting on several occasions with Jesus and with the source of supply. On at least one occasion, Christobal spoke by telephone to Isidro. Isidro asked whether Christobal had met up with the source of supply yet; when Christobal responded negatively, Isidro told him Jesus would be returning to Ecuador.

(9) On the morning Christobal was to return to the United States, he met with the source of supply, and was given 47 pellets of heroin, Christobal successfully swallowed all 47 pellets, and then went to the airport where he departed for New York.

(10) Upon arriving in New York, Christobal was met at the airport by Isidro and a woman. The three drove to a house in Connecticut, believed to be the woman's home, and spent the night. Isidro gave Christobal a laxative, and during the ensuing two hours, Christobal expelled the 47 pellets. With each pellet he expelled, Isidro instructed him to retrieve it from the toilet bowl, wash it off, and give it to him. Christobal complied. He later observed Isidro leave the house carrying all of the pellets in a bag.

(11) Christobal expected to be paid $6,000 for his trip. On the night he returned to his home in Massachusetts, Jesus gave him $3,000 cash. Christobal later received another cash payment of $2,000 from Jesus. When he was still owed money, he contacted Isidro, who agreed to send him the rest of the money. Christobal then received a Western Union money order wire in the amount of $975 from Isidro.

(12) In or around July 4, 1999, DelRosario asked Rodriquez if she was willing to go to Ecuador and swallow heroin for transport back to the United States. DelRosario

told Rodriquez that she could make approximately $8,000 if she made the trip.

(13) After the July 4, 1999 conversation, DelRosariO spoke to Rodriquez on an approximately weekly basis in order to see whether she would make the trip. DelRosariO told RodriqueZ that there was going to be a trip during the first week of August 1999, and that she therefore needed to let him know if she was interested.

(14) Approximately three weeks before an August 12, 1999 trip to Ecuador, Victor Balbuena spoke with co-defendant Juan Espinal ("Espinal") . Espinal asked Balbuena whether he wanted to take a trip to Ecuador for the purpose of picking up drugs to bring back to the United States. At the time, Balbuena owed approximately $300 to Espinal, and expected to clear his debt with him by taking the trip. Balbuena agreed.

(15) Prior to the trip, Balbuena met with Espinal at Espinal's residence. Also present at the meeting were Jesus Hernandez and the individual known as "Nino." On Jesus HernandeZ' direction, Balbuena and Nino went outside of Espinal'S apartment, where Nino gave Balbuena a carrot to swallow, in order to ascertain whether he would be able to swallow the heroin pellets. Balbuena successfully passed the test. Discussions were then held regarding Balbuena's travel arrangements. Balbuefla was given money to obtain a passport. Two days before the trip, **Pedro Jose** drove Balbuena to the home of **Pedro Jose's** sister. He again met with Jesus and was given money to pay for travel documents.

(16) Rodriquez agreed to make the trip to Ecuador in August 1999. Prior to the trip, she met with DelRosario, Jesus and **Pedro Jose** at DelRosariO's residence and, like Balbuena, was given the carrot test. She, DelRosariO, Jesus and **Pedro Jose** entered DelRosariO'S bedroom, where Jesus

handed Rodriguez pieces of carrot, soaked in oil. Rodriquez was told to swallow the pieces whole. After she successfully swallowed three carrots, Jesus asked Rodriquez if she wanted to go on the trip. During this meeting, they also discussed travel arrangements, and whether or not Rodriquez had a passport.

(17) On August 9, 1999, the evening following the meeting, Jesus gave DelRosario a plane ticket for Rodriquez' travel to Ecuador. DelRosario gave the ticket to Rodriquez. DelRosario also accompanied Rodriquez to the passport office to obtain a U.S. passport. Rodriguez' travel was scheduled for August 12, 1999, departing from Newark, New Jersey.

(18) On August 12, 1999, DelRosario told Rodriguez that he would drive her to the airport. DelRosario, **Pedro Jose,** and Balbuena met her at her home, and they all drove together to an apartment in Norwalk, Connecticut. In the apartment, Jesus gave Rodriquez $9,000 in cash, and placed a pair of sneakers in her luggage. Jesus told Rodriquez that the sneakers were for his brother, Isidro, who would meet Rodriquez in Ecuador. Jesus also gave Balbuena cash and directed him to give the money to Isidro.

(19) When Rodriquez and Balbuena arrived in Guayaquil, Ecuador, they were met at the airport by Isidro and a taxi driver, who drove directly to the MiCasa Hotel in Guayaquil.

(20) At the MiCasa Hotel, Rodriquez gave Isidro the $9,000 from Jesus. Isidro asked Rodriquez if she had a pair of sneakers for him. Rodriquez gave Isidro the sneakers, from which Isidro removed another $3,000. Balbuena also gave Isidro the money that Jesus had previously given to him. When he received the money, Isidro counted it in Rodriguez's presence.

(21) Rodriquez and Balbuena stayed at the MiCasa Hotel until August 19, 1999, which was their scheduled return date to the United States. They did not return on August 19, 1999, however, because the heroin had not yet arrived from the Colombian source of supply.

(22) While in Ecuador, Rodriguez met with the Colombian source of supply on three occasions. On the first occasion, Rodriguez and Isidro met the Colombian at the airport. The Colombian gave Isidro a vial with liquid in it and some capsules. Rodriquez and Balbuena took this prior to swallowing the heroin pellets in order to constipate them, so that the pellets would not pass through their systems prematurely.

(23) At the second meeting with the Colombian source of supply, which Rodriguez also attended, Isidro gave the Colombian a brown bag that contained $18,000 in cash. Rodriguez saw the Colombian on a third occasion, when he met Isidro at Isidro's house.

(24) Rodriquez and Balbuena did not depart Ecuador until August 26, 1999. Isidro purchased their return tickets for that date. During their second week in Ecuador, Rodriquez and Balbuefla stayed at Isidro's home. During that week, Isidro contacted his then-wife Elizabeth Hernandez and requested that she transfer money to him via Western Union. Rodriquez accompanied Isidro on three occasions to Western Union offices in Guayaquil to pick up the money.

(25) On the evening of August 25, 1999, Isidro brought the heroin, packaged in balloons in the shape of thumb-sized pellets, to Rodriguez and Balbuena. Isidro dropped the pellets into a bowl and directed them to swallow them. Rodriquez and Balbuena swallowed in excess of 1oo pellets.

(26) On August 26, 1999, Isidro drove Rodriquez and Balbuefla to the airport. Prior to leaving, RodriqueZ got sick, and spit up three of the pellets which she flushed down the toilet. While traveling on the plane, Rodriquez got sick again and threw up two pellets.

(27) On August 26, 1999, Rodriquez and Balbuena were arrested at the Bush Intercontinental Airport in Houston, Texas, after arriving on their flight from Guayaquil. Rodriguez and Balbuena had been en route to Newark, New Jersey when they passed through the U.S. Customs Inspectors in Houston.

(28) According to an offense report and drug analysis of the Houston Police Department, at the time of their arrest, Rodriquez and Balbuena were in possession of approximately 995 grams of heroin. The heroin was contained in approximately 112 pellets that Rodriguez and Balbuena had swallowed (although two of these pellets were found in Rodriquez' bra)

(29) Rodriquez and Balbuena expected to receive payment of approximately $6,000-$8,000 from Jesus and Isidro. DelRosario told Rodriguez that she would be paid $8,000 for the trip. However, when Rodriguez was in Ecuador, Isidro told her that she would be paid $6,000. After her arrest, Rodriquez contacted DelRosario and asked for assistance. DelRosario told Rodriquez that he would get in touch with both Isidro and Jesus. Rodriguez did not receive any assistance from these individuals, and DelRosario stopped accepting Rodriguez' collect telephone calls.

(30) After the arrest of Balbuena and Rodriguez, Espinal contacted **Pedro Jose's girlfriend.** He told her to give **Pedro Jose** the message that the people they sent to Ecuador had been arrested, and needed help. After the phone call, Balbuena received a letter from **Pedro** Jose enclosing $500

from "all the guys."

Victim Impact

(31) There are no identifiable victims in the present case.

Obstruction of Justice

(32) There is no available information to indicate that the defendant has obstructed justice.

Acceptance **of Responsibility**

(33) The defendant is being granted a three-level reduction for his acceptance of responsibility pursuant to U.S.S.G. § 3El.1(a) and (b) (2), as he admitted his involvement in the offense and entered a timely guilty plea, thus allowing the government to avoid trial preparation and the court to conserve its resources.

Offense Level Computation

(34) The Guideline Sentencing Range has been calculated using the guidelines in effect at the time of sentencing, that is, the guidelines contained in the Guideline Manual issued 11/1/01. The guidelines that affect the offense level and/or the criminal history calculations have not changed since the instant offense was committed.

(35) Violations of 21 U.S.C. § 963 are located at various guidelines. Where, as here, the substantive offense of the charged conspiracy is 21 U.S.C. § 952(a), Importation of a Controlled Substance, the applicable guidelines is U.S.S.G. § 2Dl.1.

(36)Base Offense Level: As the defendant is being held

accountable for 995 grams of heroin, pursuant to U.S.S.G. § 2Dl.l(a) (3) and 2D1.1(c) (5), the base offense level is 30

(37) Specific Offense Characteristics: None. 0

(38) Adjustment for Role in the Offense: None. 0

(39) Victim Related Adjustment: None. 0

(40) Adjustment for Obstruction of Justice: None. 0

(41) Adjusted Offense Level (subtotal) : 30

(42) Adjustment for Acceptance of Responsibility: -3

(43) Total Offense Level: 27

CHAPTER FOUR ENHANCEMENTS

Career Offender

(44) The career offender provisions at U.S.S.G. § 4B1.l are applicable in this case as: (1) the defendant is over the age of 18; (2) the instant offense is either a controlled substance violation or a crime of violence; and (3) the defendant has two prior convictions of either a crime of violence, or an applicable controlled substance violation.

(45) U.S.S.G § 4Bl.l directs that the offense level is determined by the offense statutory maximum, in this instance 20 years. The corresponding offense level is 32.
(46) A three (3) point adjustment is deducted for Acceptance of Responsibility, resulting in a Total Offense Level of 29.

PART B. THE DEFENDANT'S CRIMINAL HISTORY

Juvenile Adjudications

(47) None known.

Criminal Convictions

Date of Arrest/ Arraign.	Charge Agency	Date Sentence Imposed Disposition	Guideline Score
(48)			4A1.1(b)
9/22/90 (Age 18)	Att. Crim. Poss. Contr. Sub. 3rd Degree Ind#l3007-90 New York Supreme Ct.	2/4/91: Pled G., 6 mths., cmtd.	2

(49) The above information was derived from a preliminary report of the Probation Office for the Southern District of New York, which advised that arrest reports and court documents will be forwarded. Available records indicate that the defendant was represented by counsel. The defendant's FBI NCIC record indicates that the defendant also had been arraigned on a charge of Criminal Possession of a Narcotic Drug. According to the NCIC record, the offense occurred, and the defendant was arrested, on September 20, 1990. This case originated in New York Criminal Court as Dkt. No. 90N083 545.

(50)			4A1.l(a)
2/3/91 (Age 19)	Att. Robbery, 1st Degree lnd#41494-91	1/10/92: Pled G., 18 to 54 mths, cmtd.	3

New York Supreme
Ct.

(51) The above information was derived from a preliminary report of the Probation Office for the Southern District of New York, which advised that arrest reports and court documents will be forwarded. The defendant's FBI NCIC record indicates that the offense occurred on January 29, 1991 and that the defendant was arrested on January

31, 1991. The defendant was originally charged with Robbery in the 1st Degree, Attempted Murder in the Second Degree and Criminal Possession of a Weapon in the Second Degree. This case originated in New York Criminal Court as Docket No. 91N010382. On February 13, 1992, the defendant was committed to the Ulster Correctional Facility with a conditional release date of January 29, 1994. He was paroled on July 29, 1992; his parole is due to expire on January 22, 2003. On October 6, 2000, the New York Parole Division issued a warrant for the defendant's arrest, which remains active.

(52)			4A1.1(a)
7/5/95 (Age 23)	Sale of Hlcgn/NarcOtic (3 cts.) Dkt#CR95-0109785 Bridgeport Superior Ct. (Connecticut)	8/30/95: Pled G.; 10/17/95: 21 mths. to serve, 3 yrs. prob. on each ct., conc.	3

(53) Court records indicate that the defendant was represented by counsel. According to a report of the State of Connecticut Office of Adult Probation, on July 5, 1995, the

defendant was arrested while he was selling 7.5 grams of powdered cocaine. A trooper later identified the defendant as the same Dominican male from whom he had purchased quantities of powdered cocaine at the Hernandez Furniture Store in Bridgeport, Connecticut during the past several months. (This store was owned by Isidro Hernandez, the defendant's cousin and a co-defendant in the present case.) The defendant was charged with making sales of cocaine on March 9, and on April 6 and 13, 1995. The defendant was released from the Department of Correction on April 4, 1997 and began his three-year term of supervision, which was due to expire on April 4, 2000. An active arrest warrant was issued for the defendant on March 10, 1998, for violation of probation terms. It should be noted that the defendant has used the following aliases in connection with criminal proceedings in Connecticut: Porfiro Diaz, Porfirio Diaz, and Porfirio Guzman. He has also been identified as using Social Security Number 347-64-2519. A Presentence Report prepared by the State of Connecticut Office of Adult Probation in connection with this conviction is appended hereto, and is further discussed in the Offender Characteristics section of this report.

Criminal History Computation

(54) Based on the above convictions, the defendant has a subtotal criminal history score of 8.

(55) At the time that the instant offense was committed, the defendant was under the criminal justice sentences imposed on January 10, 1991 in md. No. 1494-91 in New York Supreme Court, as the defendant is on parole until January 22, 2003, and on October 17, 1995 in Docket No. CR95-0109785 in Bridgeport Superior Court, as the defendant was on supervision until April 4, 2000. Two (2) points are added, pursuant to U.S.S.G § 4A1.1(d)

(56) The total of the criminal history points is io. According to the sentencing table (U.S.S.G. Chapter 5, Part A) , 10 to 12 criminal history points establish a criminal history category of V.

TOTAL POINTS	10
CATEGORY	V

(57) As detailed above, the defendant is a Career Offender as he has at least two prior felony convictions for either a crime of violence or an applicable controlled substance offense counted separately under the provisions of S 4Al.l(a) (b) or (c), (See offenses specified in ¶ 61, 63, 65). His criminal history category is VI, pursuant to the provisions of U.S.S.G. § 4B1.l.

Pending Charges

(58)

1/12/01 (Age 29)	Poss. Firearm w/o Firearm I.D. Card Dkt#O118CR235A	10/26/01: Def. Warr. Issd.
	Poss. Firearm, not Home/Work, w/o Lic. Dkt#0118CR235B	
	False Name to P.O. Dkt#0118CR235C	
	Oper. MV w/o Lic. Dkt#0118CR235D	
	Resist. Arrest	

Dkt#O118CR235E

Fail. to Signal bef. Stop/Turn.
Dkt#0118CR235F

Oper. MV w/o Lights
DkL#0118CR235G

Fugitive Fr. Justice
Dkt#0118CR235H

Lawrence Dist. Ct.

(59) Court records indicate that the defendant is represented by counsel in the above case. According to a report of the Gang Unit of the Massachusetts State Police, on January 11, 2001, troopers observed a vehicle traveling without its headlights activated. The car pulled to the side of the road, a female entered, and the car took off at a high rate of speed. The car then made a turn without using a turn signal. The car made a quick stop to the side of the road, and the female passenger exited. The troopers then pulled behind the car and activated their blue lights. As three troopers approached the vehicle, the female leaned in and spoke to the driver, who quickly leaned forward, reached down, and appeared to rapidly move his hands in the area of his lap. A trooper who arrived at the driver's door observed the driver, the defendant, dumping white powder, suspected to be cocaine, from a folded dollar bill. The cocaine was all over the defendant's lap, and he appeared to be trying to wipe it away. The defendant exited the vehicle, stated he did not have a driver's license, and refused to provide his name. He appeared to be under the influence of cocaine. As a

trooper returned to the driver's side door, the defendant took off running. After a foot chase, the officers caught the defendant and placed him under arrest. After officers returned to the vehicle, they observed a gun partially hidden under the front seat. During booking, the defendant identified himself as Pedro Hernandez and apparently gave a false birth date of 3/15/66, as he stated his age was 33, but would actually be 34-years-old with this birth date.

Other Arrests

(60)

2/2/91	Robbery, 1st Degree	No disposition reported
(Age 19)	Crim. Poss. of Weapon, 2nd Degree	

This arrest was reported by the Probation Office for the Southern District of New York.

(61)

3/29/01	Asslt. & Batt.	5/21/01: Dism. lack Pros.
(Age 29)	Dktit9918CR7995	
	Lawrence Dist. Ct.	

PART C. OFFENDER CHARACTERISTICS

Personal and Family Data

(Note: The defendant was interviewed with the assistance of an interpreter.)

(62)Pedro Jose Hernandez, who admittedly has used thaliases "Porfirio Diaz" and "Victor Rincon," was reportedly born on October 4, 1971 in the Dominican Republic. The defendant reports that he is a citizen of the Dominican Republic and is in the United States illegally. As noted above, appended hereto is a presentence report completed by the State of

Connecticut Office of Adult Probation (the "Connecticut PSR"). There are a number of discrepancies between the information contained in the Connecticut PSR and the information provided by the defendant to this officer, which are noted further herein. Also, according to the defendant's FBI NCIC report, he has used the following birth dates: March 2, 1966; March 15, 1966; March 30, 1966; and August 15, 1973.

(63) The defendant reported that he is the only child born to Pedro Hernandez Sr. and Joaquina Aristi, although he has half-brothers and half-sisters. According to the defendant, primarily his mother raised him in a humble house in a small, semi-rural town in the Dominican Republic. The defendant reported that he was raised with his mother's four other children in impoverished circumstances. While his mother did the best she could, the defendant related that there were times when he was hungry.

(64) The defendant stated that he saw his father occasionally during his youth, but not often because his father traveled for work. He also stated that his father drank alcohol excessively. His father reportedly physically disciplined him once, although the defendant did not feel this punishment was unwarranted.

(65) When the defendant was approximately 16-years-old, he moved to Puerto Rico to find a job and live with his father, who reportedly was working in construction there. The defendant stated that on a return visit to the Dominican Republic, his father was murdered in a robbery attempt. The defendant related that he did not want to return to the Dominican Republic, given its undesirable economic situation. He instead decided to follow his half-sister, Sefa, to New York City, New York.

(66) The defendant reported that he lived with his sister for

approximately one month, until she decided to return to the Dominican Republic. The defendant remained in New York on his own because his life was "better" there.

(67) According to the Connecticut PSR, the defendant is the third of five children born to the marital union of two life-long natives of Puerto Rico: Porfirio Guzman, a construction worker, and Miriam Diaz, a homemaker. The defendant stated that he was born in New York, New York. He indicated that his childhood was non-problematic and that he was provided with all basic necessities. The defendant resided with his family in Puerto Rico until he relocated to New York in 1991.

(68) Furthermore, it should be noted that the Connecticut PSR indicates the defendant used the social security number 347-64-2519, while the defendant informed this officer that he did not use any social security number. A credit report indicated this number has been used by a "Porfirio Guzman," with various addresses in Bridgeport and Norwalk, Connecticut. One address, 43 Concord Street in Norwalk, Connecticut, is the residence of the defendant's wife, Gloria Rodriguez.

(69) **Father.** Pedro Hernandez was approximately 49-years-old when he was reportedly murdered in the Dominican Republic in 1988 or 1989. The defendant stated that his father had been a photographer and construction worker.

(70) **Mother.** Joaquina Aristi, now approximately age 60, resides in Santo Domingo in the Dominican Republic. She never married. The defendant reported that his mother formerly worked as a cook at a hospital, but is now disabled with heart problems and arthritis.

(71) **Step-mother.** According to the defendant, his father

married Petronila Perozo, now approximately age 55. Although the defendant believes she resides in the Dominican Republic, he has no contact with her.

(72) **Paternal Half-sister.** Sefa Hernandez, age 28, resides in at 90 Hollingsworth Street in Lynn, Massachusetts. Sefa provided this address, as the defendant reported that he does not know her specific street address. The defendant believes she works in a factory, is single, and has three children.

(73) **Paternal Half-brother.** David Hernandez, age 25, resides at 104 Chestnut Street in Lynn, Massachusetts and is reportedly employed as a cook in a restaurant. He is single and has no children.

(74) **Paternal Half-sister**. Yuliza Hernandez, age 22, reportedly lives in Lawrence, Massachusetts and may work in a restaurant. She is single and has three children. The defendant could provide nospecific information, and stated that he has no contact with this sister.

(75) **Paternal Half-brother.** Cesar Hernandez, age 17, resides with his brother, David, in Lynn, Massachusetts and is attending high school. He is single and has no children.

(76) **Maternal Half-brother**. Antonio Rincon, age 42, resides in the Dominican Republic and is employed as a teacher. He is married and has three children.

(77) **Maternal Half-sister.** Mercedes Aristi, age 40 or 41, resides in the Dominican Republic and works in a restaurant. She is single and has two children.

(78) **Maternal Half-brother.** Luciano Aristi, age 38, resides in the Dominican Republic and is a teacher. He is single and has one child.

(79) **Maternal Half-brother.** Jose Aristi, age 37, resides in the Dominican Republic and is employed as a baking instructor. He is single and has three children.

(80) The defendant reported that he was close to his siblings before his arrest, but that only Sefa has visited him, and he has no contact with them via telephone. He reported that he does not know any of his sibling's telephone numbers.

(81) Although the defendant reported that he did not know any telephone numbers of his siblings, his girlfriend provided the telephone number for his sister, Sefa Hernandez. Sefa stated that since his incarceration, she has visited the defendant six times, and he has telephoned her a number of times. Sefa reported that the defendant was born in February or March of 1966 or 1967 in San Rafael de Yuma in the Dominican Republic. She verified the names of the defendant's parents as Pedro Hernandez and Joaquina Aristi, and that codefendant Isidro Hernandez is the defendant's cousin. Sefa verified that the defendant's father died in the Dominican Republic in 1988 or 1989, but related that the circumstances of his death are unclear. She stated that he may have died in a boating accident, or he might have been murdered. At the time of his death, Sefa and the defendant were living together in Puerto Rico, and together moved to New York after their father's death. She stated that she returned to the Dominican Republic after living in New York for approximately one year, but the defendant remained in New York. She is not sure of the reasons behind the defendant's subsequent relocations to Connecticut or Massachusetts, but thinks he may have moved to be closer to girlfriends. Sefa verified theabove address of David and Cesar Hernandez.

(82) **Spouse.** The defendant reported that he married Gloria Rodriguez in Connecticut in 1995 or 1996. He stated that they have been separated for four years, and simply have not

gone through the process of obtaining a divorce. The defendant reported that they have limited contact, but that she has been "encouraging" towards him.

(83) Ms. Rodriguez verified the above information regarding her relationship with the defendant. She stated that he has called her several times during his incarceration, but that since their separation four years ago, their contact has been minimal. She reported that their marriage ended when the defendant left her for his current girlfriend. Ms. Rodriguez denied any history of physical abuse, and stated that the defendant is a caring person with a good heart, who got involved with the wrong people. She reported that the defendant was employed in two factories, one called Trafalger, during their marriage. She further reported that the defendant is a cousin of co-defendant Isidro HernandeZ. Ms. Rodriguez resides at 43 Concord Street in Norwalk, Connecticut and works at a nursing home. She reported that Isidro Hernandez used her address to receive mail, although he in fact lived with his wife across the street, because he was not allowed to be listed on his wife's lease.

(84) According to the Connecticut PSR, Ms. Rodriguez has four felony narcotics convictions dating from January 18, 1989 to November 20, 1991, for which she received terms of incarceration of four years, four years, four years, and 51 months, respectively. She was paroled in December 1993 and discharged from her sentence on September 21, 1994. Further details regarding her background are contained in the Connecticut PSR.

(85) **Children.** The defendant reported that he has been involved with Aura Martinez for the past four years, and that they lived together in Lawrence, Massachusetts prior to his most recent incarceration. They have two children together: Pedro Jose HernandeZ, age two; and Ashley HernandeZ, age six months. The defendant reported that he financially

supported these children prior to his arrest. Ms. Martinez has two other children, and now resides with her four children in an apartment at 47 Veteran Memorial Drive in Peabody, Massachusetts.

(86) Ms. Martinez verified that she and the defendant have been together for four years. She believes that he relocated to Massachusetts to be closer to her. She stated that life has been very difficult for her since the defendant was arrested, as he previously assisted her financially and in caring for her children. Since the defendant's arrest, his son reportedly cries for him every night. Ms. Martinez stated that she is currently employed as a teacher of blind students in Lynn, Massachusetts, but will soon have to leave her job. Her mother has been assisting her with childcare in the defendant's absence, but is ill and will leave the United States in January. Once her mother leaves, Ms. Martinez will not be able to afford day care. Ms. Martinez reported that if the defendant is deported, she plans to move to the Dominican Republic to live with him.

(87) Ms. Martinez further related that the defendant's incarceration is very difficult for his mother, as he has not seen her in 18 years, and she is very ill.

(88) Prior to living in Lawrence, Massachusetts with his girlfriend, the defendant reported that he lived alone in Lynn, Massachusetts for three years. He stated that he previously lived in Norwell, Connecticut for four years; again in Lynn, Massachusetts for less than a year; in New York City, New York for two years; and in Puerto Rico for four years.

(89) When asked if he wanted to impart any other information, the defendant related that he has been alone in the United States for many years and was forced to "grow UP by himself," alone and without any help, and fell into using drugs.

(90) The INS has lodged a detainer against the defendant.

Physical Condition

(91) The defendant is a 30-year-old Black, Hispanic male who stands 5'9" tall and weighs 175 pounds. He has brown eyes and black hair.

According to the defendant, he has no tattoos and only one scar over his right eye. The Connecticut PSR indicates he also has scars on his left cheek and right forearm, and is missing several teeth.

(92) The defendant stated that he has no allergies or serious physical ailments, and takes no medications. He reported that since his incarceration, he has experienced pain in his left knee. He was seen by a prison physician, who ordered an x-ray, but the defendant has not received any treatment.

Mental and Emotional,, Health

(93) The defendant denied any history of mental health treatment or counseling, but related that he believes he could benefit from

counseling. He reported that he sometimes suffers from depression and feels alone without his family. He stated that no treatment is offered at the Plymouth County House of Correction.

Substance Abuse

(94) The defendant reported that since his father's death, he has been using drugs and alcohol. He related that he used

cocaine, marijuana and alcohol every time he felt depressed, which was approximately once per week. The defendant related that there were times when he used these substances more often, up to several times per day, when he lived in New York and Connecticut.

(95) However, the defendant reported that once he met his girlfriend and had children with her, he ceased his substance use. The defendant stated that he has never received any substance abuse treatment.

(96) The Connecticut PSR indicates that the defendant began using marijuana in the fourth grade. The defendant also reported having a crack cocaine habit for about three years in the early 1990s. The defendant stated that he spent all of his money on drugs.

Education & Vocational Skills

(97) The defendant reported that he attended school in the Dominican Republic until the fifth grade (unverified). He reported having received no other training or education.

(98) According to the Connecticut PSR, the defendant completed the sixth grade in Puerto Rico, but suggested that he may have been a special education student. He stated that he repeated the fourth grade twice due to his marijuana use.

Employment Record

(99) The defendant reported that for the entire duration of his residence in the United States, he has earned income by taking odd jobs and being paid off the books, as he is an illegal alien. He stated that he has painted houses, worked in landscaping and in factories; in his words, "whatever he could get." Ms. Martinez verified that this was the defendant's employment during the time she has known him.

(100) According to the Connecticut PSR, the defendant held several jobs. He was employed at Hernandez Furniture in Bridgeport, Connecticut from 1994 to 1995, where he earned $10 to $15 per hour. This store is owned by Isidro Hernandez, the defendant's cousin (also a co-defendant in the instant case) . As noted above, this store is connected with the defendant's 1995 conviction on drug charges in Connecticut. The defendant indicated that Isidro Hernandez was not involved in any drug activity, but was upset about the negative media coverage given to the store. Isidro Hernandez described the defendant as "my most trusted employee."

(101) The Connecticut PSR also indicates that the defendant was employed by the New England Lock and Hardware Company in South Norwalk, Connecticut from December 9, 1994 to February 17, 1995, where he earned $125 per week.

Financial Condition -. Ability to Pay

(102) The defendant reported no significant assets or liabilities.

(103) An inquiry with the Internal Revenue Service regarding the defendant's Adjusted Gross Income and wages was not performed as the defendant reported that he has no social security number.

PART D. SENTENCING OPTIONS

Custody

(104) **Statutory Provisions:** The term of imprisonment is a minimum of 5 years to a maximum of 20 years on the one

count of conviction. 18 U.S.C. § 3559(a) classifies this offense as a Class C felony.

(105) **Guideline Provisions:** Based upon a total offense level of 29 and a criminal history category of VI, the guideline imprisonment range is 151 to 188 months.

Impact of Plea Agreement

(106) The government has entered into a plea agreement with the defendant: if the defendant provides substantial assistance, the government will file a 5K1.1 motion allowing the court to depart from the guidelines. A sentence below the minimum mandatory could also be imposed.

Good Time Provisions

(107) As per 18 U.S.C. § 3624(b), prisoners who are serving a term of imprisonment of more than one year and have shown a satisfactory institutional adjustment shall receive credit toward the service of their sentence of 54 days at the end of each year of their term of imprisonment, beginning at the end of the first year of their term of imprisonment. Such credit vests at the time of accrual and cannot be later withdrawn. Credit for the last year or portion of that year shall be prorated.

(108) Good time cannot be earned on a sentence of one year or less; the sentence must exceed one year, even by one day. According to the Bureau of Prisons, for a sentence of one year and one day, good time would be prorated and would amount to 47 days.

Supervised Release

(109) **Statutory Provisions:** If a term of imprisonment is imposed, a term of supervised release of three (3) years must

be imposed on the one count of conviction, pursuant to 21 U.S.C. § 841(h) (1) (A-C)& 18 U.S.C 3583 (b)

(110) **Guideline Provisions:** As the defendant was convicted under a statute that requires a term of supervised release, the term shall be three (3) years, pursuant to U.S.S.G. § 5Dl.2(b)

Probation

(111) **Statutory Provisions:** The penalties on the statute of conviction, 21 U.S.C. § 841(a) & (b) (1) (A) or (B), prohibit probation.

(112)**Guideline Provisions:** Per 5B1.l(b) probation may not be mposed.

Fines

(113) **Statutory Provisions:** There is a maximum fine of $1 million on the one count of conviction, pursuant to 21 U.S.C. § 841 (b) (1) (A).

(114) **Guidelines Provisions:** The fines range is from $15,000 to $1 million, pursuant to U.S.S.G. § 5El.2(c) (1) & (c) (4).

Special Assessment

(115) A total Special Assessment of $100 is mandatory ($100 on the one (1) count of conviction), pursuant to 18 U.S.C. § 3013.

Interest on Fines and Restitution

(116) As per Title 18, U.S.C. § 3612 (f) , the defendant shall pay interest on any fine or restitution of more than $2,500, unless they are paid in full before the 15th day after sentencing. Interest will be computed daily at a rate pegged to the U.S. Treasury Bills.

(117) The court, as per statute, can determine that the defendant does not have the ability to pay interest and may: (a) waive the requirement for interest; (b) limit the total interest payable to a specific dollar amount; or (c) limit the length of the period during which interest may accrue.\

(118) According to the Claims Unit of the U.S. Attorney's Office, if the Court makes no provisions for the waiver of the interest on a fine over $2,500, interest will continue to accrue on the unpaid balance of the fine if the defendant is incarcerated, is pending appeal or is paying off the fine by installment payments while on probation or supervised release.

Restitution

(119) Restitution is not an issue in this case.

Denial of Federal Benefits

(120) **Sttutory Provisions:** Upon a second conviction for an offense consisting of distribution of a controlled substance, a defendant may be declared ineligible for any or all federal benefits for up to ten (10) years as determined by the court, pursuant to 21 U.S.C. § 862.

(121) **Guideline Provisions:** The court may deny eligibility for certain Federal benefits of any individual convicted of

distribution or possession of a controlled substance, pursuant to U.S.S.G § 5F1.6.

PART E. FACTORS THAT MAY WARRANT DEPARTURE

(122) If the government files a motion certifying that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the Court, per U.S.S.G § 5K1.l, may depart downward from the guidelines. A sentence below the minimum mandatory could also be imposed.

Respectfully submitted,

ROBERT P. RYAN
CHIEF U.S. PROBATION OFFICER

By: s/Nicole F. Barrasso
Nicole F. Barrasso
U.S. Probation Officer
617-748-4420

Reviewed & Approved:

s/ Lisa Dube'
Lisa A. Dube'
Senior U.S. probation Officer

ADDENDUM TO THE PRESENTENCE REPORT

United States v. Pedro Hernandez
Docket No.01-10013

The Probation Officer certifies that the presentence report, including any revision thereof, has been disclosed to the defendant's attorney and counsel for the Government and that the content of the Addendum has been communicated to counsel. The Addendum fairly states any objections they have made.

OBJECTIONS

By the Government

No objections have been submitted by the government.

By the Defendant

No objections have been submitted by the defendant.

Respectfully submitted,
ROBERT P. RYAN
CHIEF U.S. PROBATION OFFICER

By : s/ Nocole F. Barrasso
Nicole F. Barrasso
U.S. Probation Officer

Reviewed and Approved:

s/ Lisa Dube'
Lisa A. Dube'
Senior U.S. Probation Officer
Date: February 7, 2002

25

Investigation Report x PSI __AIP __AIU
Connecticut Judicial Department

Office of Adult Probation

COURT NAME OF APPLICANT	COURT	CITY/TOWN
Diaz, Perfiro	GA-2	Bridgeport

TRUE NAME OF APPLICANT	SENTENCING DATE
Diaz, Porfirio Guzman	10/17/95

DOCKET NO. (S)
CR95-109785

ALIAS OR NICKNAME	STATE NO.
Pedro, Tony	321 FO2B 95 25372

OFFENDER DESCRIPTION
PRESENT ADDRESS
43 Concord Street 1st Floor Norwalk, CT.
TELEPHONE NUMBER 853-4735
NAME AND ADDRESS OF CLOSEST RELATIVE
Common-Law Wife:
Gloria Rodriguez, S/A
Telephone Number 853-4735

AGE	DATE OF BIRTH	PLACE OF BIRTH
24	10/4/71	New York, New York

SOC. SEC. NO. 347-64-2519

SEX	HEIGHT	WEIGHT	EYES	HAIR	COMPLEXION
Male	5' 7"	170	Brown	Black	Dark

BUILD	RACE
Med.	Hisp

IDENTIFYING MARKS - Scars on forehead, left cheek, right forearm; missing several teeth
JUDGE
John Kavanewsky

STATE'S ATTORNEY	DEFENSE ATTORNEY
Joseph Corradino	Eroll Skyers

OFFENSE(S)

Possession of Narcotics- 3 cts; Sale of Narcotics 3 counts.
OFFENSE(S) AS CONVICTED
Sale of Narcotics-3 counts
STATUTE(S) & P E NA LTY(IES)
21a-277a NMT 15 years a/o $50,000 each count
ARREST DATE 7/5/95
CODEFENDANTS None
BOND $40,000 CONFINED See Report
CONVICTED BY Guilty Pleas 8/30/95
CRIMINAL RECORD Yes

OFFENSE: On 7/5/95, Connecticut State Police arrested Porfirio Diaz and another party after the pair had arranged to meet a drug customer at the Citgo Gas Station located at the corner of East Main Street and Hamilton Street, Bridgeport. The pair were to sell several ounces of powdered cocaine, but were interrupted by police who confiscated 7.5 grams of purported cocaine. During the arrest and processing procedure, a trooper positively identified Porfirio Diaz as the same Dominican male from whom he had purchased quantities of powdered cocaine at the Hernandez Furniture Store, East Main Street, Bridgeport during the past several months. Diaz was charged with Possession of Narcotics and Possession of Narcotics with Intent to Sell on a Non-Drug Dependent Person on the matter which is pending under CR95-109784. Troopers also arrested Diaz for the sale of cocaine to an undercover officer on 3/9/95, 4/6/95 and 4/13/95, each of these transactions involving Diaz and an undercover officer who secured approximately seven to eight grams of cocaine on each of those occasions. Officers used specially marked SNTF funds for the transactions which were each conducted at the Fernandez East Main Street furniture store.

The scenario involved the undercover officer venturing to that locale where he purchased the drugs with SNTF funds before meeting other officers at prearranged locations to surrender the contraband which field tested positive for

cocaine in each instance.
The trooper, equipped with a body wire, met with Diaz on each occasion with other surveillance officers positioned around the store to observe any related activity. Diaz, while involved in the sales during March and April 1995, was not apprehended by troopers until the July 5, 1995 attempted sale when they took him into custody for all the illegal activity. The offender has since been held in lieu of $45,000.00 bond on the two matters which are both scheduled for disposition on 10/17/95.

OFFENDER'S VERSION: The subject admitted his involvement in the sales, though suggested that one Luis Morales, a resident of a dwelling behind the furniture store, had set Whim up. While reporting that he had purchased drugs -for Morales on several occasions, he was unable to provide any explanation while that party would involve him in the scenario which resulted in him having direct dealings with the state police officers who then proceeded to purchase substantial quantities of cocaine from him on several occasions.

CRIMINAL RECORD

DATE	LOCATION	OFFENSE	DISPOSITION
7/5/95	Ct. State Police	Sale of Narcotics 3 counts	Instant Offense CR95109785
7/5/95	Ct. State Police	Poss. of Narcotics Poss. of Narcotics With Intent to Sell	pending- CR95109784

The subject was held on an additional $5,000.00 bond on this matter.

CURRENT PERSONAL HISTORY

The following information was gleaned with the assistance of Rose Curt-in, a court-appointed interpreter, who accompanied the undersigned officer to the Bridgeport Correctional Center on 9/28/95 for investigative purposes. The offender is the third of five children born to the marital union between Miriam Diaz and Porfirio Guzman, both life long natives of San Juan. Puerto Rico. The 45 year old mother has acted primarily as a homemaker through the years, while the 47 year old father has been a long term construction worker. The offender reported that he is the singular family-member to incur criminal difficulties, adding "my parents are aware of my arrest and confinement." The offender reported that he maintained contact with the pair prior to his July 1995 arrest, and suggested that his common-law wife had since spoken to them, but "I told her not to tell them. They think I'm living in Bridgeport. They would be very upset to learn of what happened. I don't want them to find out."

The offender reported that he resided with the family until relocating to the Norwalk, Connecticut area in 1991. suggesting that the parents were less than thrilled about his leaving home, he reported that they were desirous of having him remain in Puerto Rico in order to assist the family financially. He depicted a non-problematic rearing, noting that the parents provided him with the basic necessities despite their being in the lower economic class.

The offender reported successful completion of 6th grade in Puerto Rico, though reported that he repeated 4th grade on at least two occasions due to marijuana use. He suggested that he may have been a special education student, though reported leaving the academic setting on a voluntary basis at 13 or 14 years of age. The offender has amassed no schooling whatever since that time, and suggested being able to "get by" in Spanish. While born in New York, the offender was schooled in Puerto Rico, a condition which prompted the utilization of Spanish as the primary language amongst all family members. The offender has not been involved in any

school program since confined, though expressed some interest in taking "English as a Second Language" following his anticipated confinement.

The offender was last employed at Hernandez Furniture, East Main Street, Bridgeport in a part-time delivery capacity. Initially hired during the summer of 1994, the offender was able to amass full-time hours beginning in February of 1995. He reported that he was averaging $10.00 to $15.00 per delivery, noting that he was netting some $120.00 to $125.00 weekly in the full—time capacity. The offender reported that Isidro Hernandez, owner of the store, considers him eligible for rehiring upon release. He suggested that the employer was not involved in any drug sale activities, though suggested that he was extremely upset, to see his store's name involved in the media coverage following his arrest in this matter. .."but he forgave me." Hernandez contacted this officer on 10/5/95 offering the following.. ."He was my most trusted employee, a non-problematic individual who is eligible for immediate rehiring.

The offender was previously employed by the New England Lock and Hardware Company, South Norwalk, where he worked from December 9, 1994 through February 17, 1995 (verified). The offender earned $125.00 net weekly in the full-time position of 40 hours weekly. The offender reported performing seasonal jobs for varied landscaping firms in the Bridgeport area for some 8-9 months, though was unable to recall the names of any of the former employers. He denied collecting unemployment, city welfare or state welfare benefits at any time since residing in Connecticut.

The offender did report being employed on a full-time basis with Alberto Perez Construction, a four-year opportunity which paid him $160.00 weekly prior to his relocation from Puerto Rico. The offender suggested that he left the site to "come to Connecticut for a better life." The offender reported that he had initially lived in the Bridgeport area for two years prior to moving to Norwalk with the common-law wife. While he has never married nor fathered any children, the

offender involved himself in a relationship with one Gloria Rodriquez, a native of Bronx, New York, two years ago. While the offender was "unsure" as to whether Rodriquez had ever been involved in criminal difficulty, a review of existing records indicate that she has four felony narcotics convictions spanning January 18, 1989 through November 20, 1991. Rodriquez was confined on each of those matters, receiving an effective term of 4 years, 4 years, 4 years and 51 months respectively. Released to Parole officials in December, 1993, she was discharged "end of sentence" on 9/21/94.

Records reveal that Rodriquez graduated from William Howard Taft High School, Bronx, New York in 1976, later attending Bronx Community College where she took some nursing courses prior to her departure. She subsequently wed one Wilson Vega, parenting two children (now 17 and 15 years old), in this union. The couple separated in 1979 with Vega moving to Pennsylvania, leaving the children with their mother.

Records indicate that Rodriquez had worked in clerical positions for 1982 to 1985, then securing AFDC benefits during 1986 through 1988. Records indicate that she then worked as a bartender, although returned to drug sale activity due to inadequate income.

Records would suggest that Rodriquez was involved in several drug sales opportunities though she denied that she was a drug user herself. Records indicate that she was remorseful for the illegal activity, suggesting that she was desirous of entering the nursing field after securing more of the vocational training.

The offender suggested that the offender is so involved at present, though could not volunteer the name of her employer. He suggests that she "works with handicapped people in Norwalk", a position apparently entered into following her 1993 discharge from correctional confines. While reporting that she is earning $9.50 hourly of as a certified nurse, a review of her existing records would

suggest that she may be employed in either a private duty or home health aide capacity.

Rodriquez directed a letter for the court's consideration, this dated 9/7/95 and containing the following.. ."My name is Gloria Rodriquez and I've been Porfirio Diaz' common-law wife for the past two years, since March 1993. Porfirlo has been a wonderful husband, a hard working man, very responsible with his responsibility in the home. Porfirio has held a steady job in the past 1 ½ year since we have been together. We have plans to get married, so we can start to raise a family. Porfirio has never gotten in trouble before. He is well liked by all his acquaintance and family. He made a mistake, but he 'is only human and everyone makes a mistake in their lives at one point or another. He feels bad for what he has done, and I can assure you, once he does his time, you will no longer see him get into any trouble. I stand by Porfirio, and will stand by him always because he is worth while waiting for. He is a good~man.I'm a certified nurse, and together we have made a home for ourselves. Thank you for your attention." Sincerely: Gloria Rodriquez.

As Rodriquez' two children reside with their father in California, the apartment secured by Rodriquez and Diaz two years ago calls for a $550.00monthly obligation for the arrangement which is listed in both names. The offender depicted Rodriquez as "a good woman. I live with her, but can'tget real serious with her due to my drug problem. She's been very good to me. We plan to wed after I get out." The offender reported that Rodriquez and the former employer, Isidro Hernandez, are the two sole parties to have visited him since his confinement three months ago. The offender reports that the future of this relationship is predicated on his remaining drug free, adding "she would be very upset if I was arrested or I returned to drugs." While several efforts were made to contact Rodriquez, the undersigned officer had no success as of this writing. As the offender was unable to provide the name for the current organization for which she worked, it was difficult to reach her during the normal course

of business hours. In light of Rodriquez' prior criminal record regarding drug sale activity, it is difficult to assess what affect might result from the couple continuing to live together.

The offender denied any physical abnormalities or mental health interventions to date. He reported that he has been a long term beer consumer, denoting this primarily as a weekend habit.. ."I drink several beers daily from Friday to Sunday. I've gotten drunk, but I've never blacked out or had any treatment." The offender reported that Rodriquez is an infrequent alcohol consumer, suggesting that the pair "had argued about my drinking.. .but she is really more upset about my drug addiction."

The offender reported beginning marijuana use in the fourth grade, a habit which he maintained until he began the intranasal use of cocaine three months after his 1991 arrival in this area. The offender then proceeded to crack use, a habit which he had maintained for at least three years. Reporting that he used three to four times weekly,, he then noted.. ."I did whatever I could find and afford. I bought cocaine and cooked it up myself up to 2-3 grams at a time."

The offender reported that Rodriquez was unaware of his drug use until late 1994, suggesting that "I only really got addicted over the past ten months. I got drugs for this guy and then he set me up with the State Police, but I don't know why." Diaz reported that he had procured drugs for this

- individual who was purchasing quantities of them and from which he would take some for himself.. ."I spent all my money on drugs. I have no more money." The offender has not involved himself in any NA or AA programs, nor has he entered the Tier I substance abuse treatment program since confined.

The offender reports that he is desirous of entering a residential program, suggesting that he could not be trusted if released without said treatment. He reports that he was involved in no other sales save for the ones noted in the offense section of this report.. ."I just bought drugs." The

offender denies that he has used any drugs since confined, though reported that he was unable to remain drug free for any longer than a 2 or 3 day period while in the community. He is hopeful that the court will consider placing him in a residential treatment program in lieu of any further confinement.

This 24 year old party has entered guilty pleas to three separate transactions in which he sold quarter-ounces of cocaine to undercover police officers/Connecticut State troopers at or near his place of employment. The offender denied any other drug sale activities, suggesting that he had been set up by an individual residing behind the furniture store where he was employed.

The offender emanates from an apparently intact family background which includes no other criminally involved members. The offender reported a short term academic history and several years of employment in Puerto Rico prior to venturing to Bridgeport and then Norwalk in 1991 and 1993 respectively. The offender has enjoyed moderate success in the employment area since arriving here, though would appear to have been diverted by an escalating drug habit which caused him using escalating amounts of cocaine to fuel his addiction.

While the offender depicts a supportive relationship with his common-law wife, Gloria Rodriquez, ft is somewhat disconcerting to note that that party herseLf has been convicted on four separate occasions for drug sale activity. While discharged to Parole officials in 1993, it would appear that Rodriquez has remedied her old ways, securing employment in the Home Health Aide/Health Care field. The pair have lived together without child-rearing responsibilities.

The offender has been a long term substance abuser as evidenced by his recollection of smoking marijuana on a regular basis since fourth grade. While his drug use has obviously escalated, it would appear that it became almost necessary for him to involve himself in drug sale activity.

While the offender is desirous of securing some residential

treatment, it would appear that some period of confinement is warranted at this point in time. It is suggested that the court impose the normal special conditions attendant with such a conviction, and encourage him to embark on the same remedial course as that of his common-law wife.

SUPPLEMENTAL INFORMATION ATTACHED (Specify)

BASED ON THE INVESTIGATION THE FOLLOWING IS RECOMMENDED:

PROBATION: Split Sentence

RECOMMENDATION

SPECIALCONDITIONS/CIRCUMSTANCES

RESPECTFULLY SUBMITTED
JAMES VANVOLKENBURGH

s/ James Vanvolkenburgh

COUNTERSIGNED BY

s/ Mary Kerton

U.S. Department of Justice
United States Attorney
District of Massachusetts

Main Reception: (617) 748-3100
John Joseph Moakley United States Courthouse
I Courthouse Way
Suite 9200
Boston. Massachusetts 022 /0
November 27, 2001

Richard N. Welsh
80 Worcester Street
North Grafton, MA 01530

Re: United States v. Pedro Jose HernandeZ
Criminal No. 01-10013-MEL

Dear Mr. Welsh:

This letter sets forth the Agreement between the United States Attorney for the District of Massachusetts ("the U.S. Attorney") and your client, Pedro Jose HernandeZ ("Hernandez") in the above-captioned case. The Agreement is as follows:

1. Change of Plea.

At the earliest practicable date, Hernandez shall plead guilty to Count One of the above-captioned Indictment: United States v. Pedro Jose Hernandez, Criminal No. 01-10013-MEL, charging him with conspiracy to import heroin, in violation of 21 U.S.C. § 963. Hernandez expressly and unequivocally admits that he in fact knowingly, intentionally and willfully committed the crime charged in Count One of the Indictment, and is in tact guilty of that offense.

The United States Attorney also agrees that he will not file any notices pursuant to 21 U.S.C. §851.

2. Penalties

Hernandez faces the following maximum penalties: a period of incarceration not to exceed twenty (20) years, a maximum fine of $1,000,000, a period of supervised release of three (3) year: and a special assessment of $100.00

As a result of his conviction in this case, Hernandez may also face a mandatory minimum sentence of 5 or 10 years' imprisonment, pursuant to 21 U.S.C. § 841(b) (1) (A) and § 841(b) (1) (B).

Hernandez may also be deportable and/or excludable by the United States Immigration and Naturalization Service as a consequence of his conviction of the offenses to which he is pleading guilty.

3. Sentencing Guidelines

The parties will take the following positions at sentencing under the United States Sentencing Guidelines:

(a) Hernandez reserves the right to argue for a reduction based on role pursuant to U.S.S.G. § 3B1.2. The United States Attorney reserves the right to oppose that argument, and reserves the right to argue for any applicable role enhancement under U.S.S.G. § 3B1.1.

(b) Based on Hernandez' prompt acceptance of personal responsibility for the offense of conviction in this case, and information known to the U.S. Attorney at this time, the U.S. Attorney agrees to recommend that the Court reduce by three levels Hernandez' Adjusted Offense Level under U.S.S.G. § 3El.1.

The U.S. Attorney specifically reserves the right not to recommend a reduction under U.S.S.G. § 3E1.l it, at any time between his execution of this Agreement and sentencing Hernandez:

(a) Fails to admit a complete factual basis for the plea;

(b) Fails to truthfully admit his conduct in the offenses of conviction;

(c) Falsely denies, or frivolously contests, relevant conduct for which Hernandez is accountable under U.S.S.G. § 1131.3;

(d) Fails to provide truthful information about his financial status;

(e) Gives false or misleading testimony in any proceeding relating to the criminal conduct

charged in this case and any relevant conduct for which Hernandez is accountable under U.S.S.G. § lBl.3;

(f) Engages in acts which form a basis for finding that Hernandez has obstructed or impeded the administration of justice under U.S.S.G. § 3C1.l;

(g) Intentionally fails to appear in Court or violates any condition of release;

(h) Commits a crime;

(i) Transfers any asset protected under any provision of this Agreement; and/or

(j) Attempts to withdraw his guilty plea.

Hernandez expressly understands that he may not withdraw his plea of guilty if, for any of the reasons listed above, the U.S. Attorney does not recommend that he receive a reduction in Offense Level for acceptance of responsibility. Hernandez expressly understands that, in addition to declining to recommend an acceptance-of _responsibility adjustment, the Government may seek an upward adjustment pursuant to U.S.S.G. § 3Cl.l if Hernandez obstructs justice after the date of this Agreement.

The U.S. Attorney and Hernandez are unaware at this time of any basis for a departure from the sentencing range established by the United States Sentencing Guidelines. In the event that either the U.S. Attorney or Hernandez subsequently learns that there is a basis for moving for

departure, that person will give written notice to the other party of the basis for such departure not less than fourteen days before sentencing. Any basis for departure for which written notice is not received at least fourteen days before sentencing is hereby expressly waived and cannot be argued at the time of sentencing. The U.S. Attorney expressly reserves the right to seek an upward departure pursuant to U.S.S.G. § 4A1.3 should any of Hernandez' prior state convictions be vacated subsequent to the execution of this Agreement.

In the event of an appeal from, or collateral challenge to, Hernandez' sentence, the U.S. Attorney reserves his right to argue the correctness of Hernandez' sentence and the manner in which the District Court determines it.

4. Payment of Mandatory Special Assessment

Hernandez agrees to pay the mandatory special assessment to the Clerk of the Court on or before the date of sentencing, unless Hernandez establishes to the satisfaction of the Court that Hernandez is financially unable to do so.

5. Cooperation

a. Terms Of Cooperation

Hernandez agrees to cooperate fully with law enforcement agents and government attorneys. He must provide complete and truthful information to all law enforcement personnel. If his testimony is requested, he must testify truthfully and completely before any grand jury, and at any hearing and trial. Hernandez must answer all questions put to him by any law enforcement agents or government attorneys and must not withhold any information. He must not attempt to protect any person or entity through false information or omission, or to implicate falsely any person or

entity. Upon request, he must furnish all documents, objects and other evidence in his possession, custody or control that are relevant to the government's inquiries.

Hernandez understands that he has a right to have counsel present when communicating with representatives of the government concerning the criminal conduct with which he has been charged. To facilitate his cooperation, Hernandez hereby knowingly and voluntarily waives this right with respect to all debriefings by law enforcement agents and government attorneys and all appearances to testify. This waiver may be revoked at any time by a specific request by Hernandez or his counsel without otherwise affecting the terms or enforceability of this Agreement.

To enable the Court to have the benefit of all relevant sentencing information, Hernandez waives any rights he may have to prompt sentencing and will join in any requests by the U.S. Attorney that sentencing be postponed until Hernandez' cooperation is complete. Hernandez understands that the date of his sentencing is within the sole discretion of the Court and that this Agreement may require his cooperation to continue even after he has been sentenced. Hernandez' failure to continue to

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tocooperate pursuant to the terms of this Agreement after sentence is imposed shall constitute a breach of this Agreement by Hernandez.

b. Substantial Assistance Motion

In the event that Hernandez provides substantial assistance in the investigation or prosecution of another person who has committed a criminal offense, the U.S. Attorney agrees that, at or before the time of sentencing, the u.s. Attorney will make a motion under U.S.S.G. § 5K1.l, and, if the U.S. Attorney determines it to be appropriates 18 U.S.C. § 3553(e) so that the sentencing court may impose a sentence below that which otherwise would be required under the Sentencing Guidelines and the relevant statutes. The determination whether Hernandez has provided substantial assistance rests solely in the discretion of the U.S. Attorney and is not subject to appeal or review. The u.s. Attorney expressly reserves the right to decline to file a motion pursuant to U.S.S.G. § 5Kl.l if Hernandez violates any condition of his pretrial release, violates any of the requirements of honesty and candor detailed in paragraph 5(a) above, or engages in any criminal conduct after the date he signs this Agreement. The U.S. Attorney reserves the right, in his sole discretion, to file a motion under U.S.S.G. 5 5Kl.1 but not under 18 U.S.C. § 3553(e). Hernandez may not withdraw his plea if the U.S. Attorney determines that Hernandez has not rendered substantial assistance, if the U.S. Attorney determines to file a motion under U.S.S.G. § 5K1.1 but not under 18 U.S.S.G. § 3553(e), or if the Court refuses to grant the U.S. Attorney's motion for a downward departure.

c. Sentence Recommendation,with Substantial Assistance

If Hernandez provides substantial assistance, subject to all the provisions of paragraphs 5(a) and (b)

above, the U.S. Attorney will advise the sentencing judge of the full nature, extent and value of the assistance provided by Hernandez.

The U.S. Attorney reserves the right to recommend a particular sentence or sentencing range, or to make no recommendation at Hernandez' sentencing.

d. Letter Immunity

In return for Hernandez' full and truthful cooperation, the U.S.Attorney agrees not to use any information provided by Hernandez pursuant to this Agreement or pursuant to the proffer letter dated September 5, 2001 (or any information directly or indirectly derived therefrom) against Hernandez in any criminal case except in a prosecution (1) for perjury or obstruction of justice, or for making a false statement after the date of this Agreement; or (2) for an act of physical violence against the person of another, or conspiracy to commit any such act of violence. The U.S. Attorney reserves the right to respond fully and completely to all requests for information by the District Court and U.S. probation Office in this case. All such disclosures, however, shall be made subject to the provisions constraining the use of this information by the District Court and U.S. Probation Office contained in U.S.S.G. § 1B1.8(a) and the commentary thereto. Notwithstanding the provisions of U.S.S.G. § 1B1.8(b) (5) and the commentary thereto, the U.S. Attorney agrees to take the position that at the time of sentencing information provided by Hernandez pursuant to this Agreement should not be used either in determining where within the applicable guideline range to sentence Hernandez or in determining whether, or to what extent, a departure from the Sentencing Guidelines is warranted.

If the U.S. Attorney determines that Hernandez has breached this Agreement by making any false, incomplete or misleading statement, or by providing any false, incomplete or misleading information to any law enforcement personnel,

grand jury or court, the U.S. Attorney may terminate this Agreement as set forth below, and may also prosecute Hernandez for any and all offenses that could be charged against him in the District of Massachusetts, including, but not limited to, false statements and perjury.

6. Court Not Bound By Agreement

The sentencing recommendations made by the parties and their respective calculations under the Sentencing Guidelines are not binding upon the U.S. Probation Office or the sentencing judge. Within the maximum sentence which Hernandez faces under the applicable law, the sentence to be imposed is within the sole discretion of the sentencing judge. Hernandez' plea will be tendered pursuant to Fed. R. Crim. p. 11(e) (1) (B). Hernandez may not withdraw his plea of guilty regardless of what sentence is imposed. Nor may Hernandez withdraw his plea because the U.S. Probation Office or the sentencing judge declines to follow the Sentencing Guidelines calculations or recommendations of the parties. In the event that the sentencing judge declines to follow the Sentencing Guidelines calculations or recommendations of the U.S. Attorney, the U.S. Attorney reserves the right to defend the sentencing judge's calculations and sentence in any

subsequent appeal or collateral challenge.

7. Information For Presentence Report

Hernandez agrees to provide all information requested by the U.S. Probation Office concerning his assets.

8. Civil Liability

By entering into this Agreement, the u.s. Attorney does not compromise any civil liability, including but not limited to any tax liability, which Hernandez may have incurred or may incur as a result of his conduct and his plea of guilty to the charges specified in paragraph one of this Agreement.

9. Rejection of Plea By Court

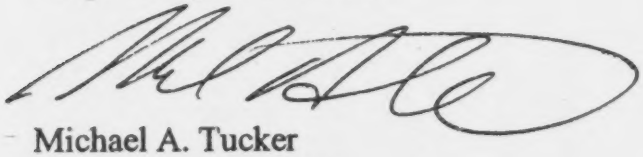
Should Hernandez' guilty plea not be accepted by the Court for whatever reason, or later be withdrawn on motion of Hernandez this Agreement shall be null and void at the option of the U.S. Attorney.

10. Breach of Agreement

If the U.S. Attorney determines that Hernandez has failed to comply with any provision of this Agreement, has violated any condition of his pretrial release, or has committed any crime following his execution of this Agreement, the U.S. Attorney may, at his sole option, be released from his commitments under this Agreement in their entirety by notifying Hernandez, through counsel or otherwise, in writing. The U.S. Attorney may also pursue all remedies available to him under the law, irrespective of whether he elects to be released from his commitments under this Agreement. Further, the U.S. Attorney may pursue any and all charges which have been, or are to be, dismissed pursuant to this Agreement. Hernandez recognizes that no such breach by him of an obligation under this Agreement shall give rise to grounds for withdrawal of his guilty plea. Hernandez understands that, should he breach any provision of this agreement, the U.S. Attorney will have the right to use against Hernandez before any grand jury, at any trial or hearing, or for sentencing purposes, any statements which may be made

by him, and any information, materials, documents or objects which may be provided by him to the government subsequent to this Agreement, without any limitation. In this regard, Hernandez hereby waives any defense to any charges which he might otherwise have under any statute of limitations or the Speedy Trial Act.

Respectfully Submitted,



Michael A. Tucker
Griffin & Tucker, P.C.
24R Pleasant Street
Newburyport, MA 01950
(978) *465-3590*
Counsel of Record for Petitioner

(3)

Supreme Court, U.S.
FILED
05-17 APR 19 2005
OFFICE OF THE CLERK

DOCKET NO. ____

IN THE

SUPREME COURT OF THE UNITED STATES

United States

Respondent

v.

Pedro Jose Hernandez, a/k/a Juan Pedro, a/k/a Pedro Jose

Petitioner

On Petition For Writ Of Certiorari
To The
United States Court Of Appeals For The First Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORI
Volume 2 of 2

Michael A. Tucker
Counsel of Record For Petitioner
Griffin & Tucker, P.C.
24R Pleasant Street
Newburyport, MA 01950
(978) 465-3590

APPENDIX TABLE OF CONTENTS

Volume 1 Contains:

A1. Presentence Report..... 1

Volume 2 Contains:

A2. Sentencing Transcript of the United States District Court for the District of Massachusetts..... 55

A3. Judgment of the United States District Court for the District of Massachusetts.....75

A4. Judgment of the United States Court of Appeals for the First Circuit.....86

A5. Relevant Provisions of 18 U.S.C. § 3553 (a) and (b).....89

A6. Relevant Provisions of 18 U.S.C. § 3742(e).....96

A7. Rule 11 Hearing of United States District Court for the District of Massachusetts.....99

A2

Sentencing Transcript of the United States District Court for the District of Massachusetts

United States v. Pedro Jose Hernandez

Docket No. 01-10013

Before Judge Morris E. Lasker

Held on August 21, 2002

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETT

UNITED STATES OF AMERICA,
Plaintiff

v.

PEDRO JOSE HERNANDEZ, Criminal No. 01-10013
Defendant SENTENCING HEARING

BEFORE THE HONORABLE MORRIS E. LA.SKER
UNITED STATES DISTRICT COURT JUDGE

APPEARANCES:
For the Government:
Susan Poswistilo, United States Attorneys Office, 1 Courthouse Way, Boston, MA 02210
For the Defendant:
Richard Welsh, Esquire, 80 Worcester Street, North Grafton, MA 01536

One Courthouse Way
Boston, Massachusetts 02210
Wednesday, August 21, 2002
Janet M. Konarski, RMR, CRR
Official Court Reporter
John J. Moakley U.S. Courthouse
1 Courthouse Way, Suite 3510
Boston, Massachusetts 02210
(617) 439-8866

(The following hearing was held in open court before the Honorable Morris E. Lasker, United States District Judge, United States District Court, District of Massachusetts, at the United States Courthouse, 1 Courthouse Way, Boston, Massachusetts, on August 21, 2002, commencing at 2:39 p.m.)

THE CLERK: Court is now in session.

THE COURT: Good afternoon, everybody.

MS. SAWYER: Good afternoon.

THE CLERK: This is Criminal 00—11003, United States of America versus Pedro Jose Hernandez. Would the parties identify themselves and who they represent.

MS. POSWISTILO: Good afternoon, Susan Poswistilo for the United States.

MR. WELSH: Good afternoon, Richard Welsh for the defendant.

THE COURT: Good afternoon, Mr. Welsh. Has the interpreter been sworn?

THE CLERK: No.

(Margarita Cardenas, the interpreter, was sworn.)

THE CLERK: Would you please give the court your full name, spelling the last. Margarita Cardenas, C-A-R-D-E-N-A-S.

THE COURT: Ms. Poswjstilo, before I call on Mr. Welsh, is there anything you wish to say, on behalf of the government any know this case pretty well by now.

MS. POSWISTILO: Your Honor, I just wanted to alert

the Court the government did file a motion in this case.
THE COURT: I appreciate that. Although next time when you have a case, I hope you'll do it a little sooner than
the day before.
MS. POSWISTILO: I most definitely strive to do that at all times, your Honor. It was beyond my control.
THE COURT: Mr. Welsh?
MR. WELSH: I will be addressing the court. One of the issues that I raised in my sentencing memorandum was his
family circumstances.
THE COURT: Yes.
MR. WELSH: His common law wife is present in the court. I would ask if I might call her to the stand, so she can explain the family circumstances.
THE COURT: Of course. Do you want her to come up to the witness stand?
MR. WELSH: Yes, Judge. That would be fine. Which side do you want her at?
THE COURT: Over here.
AURA MARTINEZ, SWORN
THE COURT: Do you understand English, Ma'am?
HE WITNESS: I understand.
THE COURT: Sit down and relax. I know it's a tough day, but --
THE CLERK: Would you please give your full name.

THE WITNESS: Okay. Aura, A-U-R--A, Martinez, M-A-R-T-I-N-E-Z.
THE COURT: Thank you.
BY MR. WELSH:
Q. Ms. Martinez, do you know the defendant in this case, Pedro Hernandez?
A. Yes.
Q. What is his relationship to you?
A. We was living together a few years.
Q. Okay. And how long have you been living together?
A. From 1997.
Q. And have you lived together as husband and wife?
A. Yes.
Q. Although you haven't legally married?
A. Not legally married, but we lived together like husband and wife.
Q. Like husband and wife?
A. Yes.
Q. And did you have one child together before he came into prison here?
A. Yes.
Q. And how old is that child?
A. Almost three years old.
Q. At the time that he was detained here in this Federal action, were you pregnant with his second child?

A. Yes.
Q. How many months pregnant were you?
A. Four months.
Q. And, so, then he's been detained since February, at least, of 2001?
A. Mm-hmm.
Q. Is that correct?
A. Yes.
Q. And, so, you had the child while he was locked up?
A. Yes.
Q. And do you have two children besides of your own?
A. Yes.
Q. So, you have four children?
A. Four children.
Q. Before he was detained in this Federal proceeding, was he a father to all four children?
A. Yes.
Q. Was he a good father?
A. Yes, please.
Q. And did he help to support the children?
A. Yes. He helped me out.
Q. Now, since he's been detained in this Federal proceeding, have you been the sole support of these children?
A. Mmm-hmmm.
Q. And can you tell the Judge now, talk to the Judge

directly. Tell him what you've had to go through since he's been detained in order to support the children.
A. It's very hard. I have to drive every day 5 o'clock in the morning to Lawrence. I live in Peabody, and I work in Lynn for Lynn Public Schools. I have to go all the way clown to leave my children with my mom, go back to Peabody, leave another two in the school and go back to Lynn to my work. Then when I come back in the afternoon, the same thing, go back to Peabody, pick up two, then go back to Lawrence to take another two, small ones, and go back to my home.
THE COURT: That's rough. So, do you --
THE WITNESS: Yes, it is.
Q. Do you work, you said, for the school department, the City of Lynn?
A. Yes, for eight years.
Q. You work in the Bilingual Department?
A. Yes.
Q. Does much of the money you earn have to be used for babysitting?
A. Yes.
THE COURT: What is your job?
THE WITNESS: I teach Braille for blind students.
THE COURT: Oh. How did you learn that?
THE WITNESS: I take a few courses, and somebody from the mission department gave me the training.

THE COURT: May I ask you what your salary is?
THE WITNESS: Almost $600 a week, just 30 hours.
THE COURT: I see.
THE WITNESS: But, I do babysitting, clean houses, too, to make extra money.
THE COURT: You're some lady.
Q. And you've been visiting Pedro on a regular basis down in Plymouth?
A. Every week, yes.
Q. Every week. And during one of those visits, did you have a problem?
A. Yes.
Q. Tell the Judge what happened.
A. I had an accident in the car when I came back from there, dislocating my right arm, and I broke my chin right here (indicating).
Q. That is while you were visiting Pedro down in Plymouth?
A. Yes. Little Pedro, he's three years old, he was crying because he wanted to stay with his father after the visit, an he was in the back chair. I was trying to speak with him, relax him, calm him down. He's still crying. When I turn around, another car cut in my lane, and I tried to brake, but I couldn't. I lost control of the car.
Q. All right. Now, when Pedro is released from confinement, you understand that the probability is he'll be deported to

the Dominican Republic?
A. Yes. I know that.
Q. What will you do?
A I'm going to go with him and my children.
THE COURT: Is that your country?
THE WITNESS: No.
THE COURT: Were you born there?
THE WITNESS: No.
THE COURT: Where were you born?
THE WITNESS: Venezuela. A few years ago I've been there, to visit his mother. I like the country.
Q. You'll be reuniting the family in the Dominican Republic
when he's released?
A. Mm-hmm.
Q. If he's confined out of state, say in Pennsylvania or New
York, will you be able to visit with him?
A. I don't think so. It's too hard, with my four children, to bring my four children out of the state.
MR. WELSH: That will be because I'll be asking you to consider recommending ——
THE COURT: Of course I'll recommend, but I can't control it.
Q. What can you tell the judge about Pedro's mother?
MS. POSWISTILO: Excuse me. I didn't hear about. Pedro's what?

MR. WELSH: Pedro's mother.
A. She's very sick. She knows that Pedro is in the jail. She has a stroke, then she had a heart attack. She's in critical medical condition right now.
Q. She's living in the Dominican Republic?
A. Yes. She didn't see Pedro for maybe 19 years.
MR. WELSH: All right. I don't have anything further, Judge.
THE COURT: Thank you very much, Ma'am.
THE WITNESS: You're welcome.
THE COURT: Mr. Welsh, I appreciate your bringing this matter to my attention. It's perfectly appropriate. As you know, as we all must know, it is not possible in the circumstances of this case simply to tell Mr. Hernandez God bless you and go, so I'd like to hear what you have to say as to what you think is a realistic disposition of this case.
MR. WELSH: I will, Judge. As you know, the government has filed a motion under 5(k) for substantial assistance.
THE COURT: Yes.
MR. WELSH: As a matter of fact, he has I think rehabilitated to the point that he has actually indicated a willingness to testify against his own cousin, Isidro, who was perhaps one of the organizers in this matter. I will point out I've been involved in this case

for about 18 months.
THE COURT: It's been a long case.
MR. WELSH: He's engaged in six different proffer sessions, as pointed out in the 5(k) motion. I've spent a total of 12 hours with him and U.S. attorneys, customs agents,
DEA agents. There was an investigation down in Connecticut.
I was in touch with the Assistant U.S. Attorney down in Connecticut, and we had indicated a willingness to cooperate
with them on an investigation that was going on down there.
It never actually came about, because the individual apparently pleaded guilty before we got to that.
As recently as last week, Mr. Hernandez was before, was here in Boston, where we had a proffer with a customs agent relative to a homicide that supposedly had taken
place in Lawrence, and he indicated a willingness to give information on that matter. That is still under investigation, so that may result in a Rule 35 motion later on. You understand, I'm sure, for example, from the 5(k) motion the Government points out Isidro Hernandez was notified
that Pedro had indicated a willingness to testify against him,
so that increases his risk while he's in prison. He becomes known as a cooperator.
I'm also concerned about possible danger to Aura and her children once it becomes known that he is a cooperator. I would also point out to you that because he's

been cooperating, his sentence, we had all agreed his sentence might be delayed, and he was originally supposed to be sentenced back in February, and now here we are, six months down the road, by agreement, so he could continue his cooperation, but I know from my own experience that the situation in Plymouth, where he's been locked up, involves a lot of hardships.

There are no contact visits in Plymouth. They're restricted to one unit. They're not allowed to move throughout the system, and there are no programs similar to Federal programs. I would also like to argue to you, if you read through the offense conduct, it appears that Pedro Hernandez really played a relatively minor role in this conspiracy.

THE COURT: The problem in this case, as I see it, is not only the conduct in this case, but the prior convictions, which under the guidelines, as you know, classify him as a career offender.

MR. WELSH: I understand.

THE COURT: Without the motion to depart, the minimum would be 170 months, and I can't just ignore those things.

MR. WELSH: I think it would be 151, Judge.

THE COURT: Or 151.

MR. WELSH: 151 months. But, I think you can consider his role in the conspiracy that is charged here.

He's probably the least activity of all of them. He took no trips to Ecuador. He had no contact with the drugs. There is no indication that he received any of the money. The organizers were clearly Isidro and Jesus, and I think your Honor sentenced Isidro to 97 months.

THE COURT: I did, but I really, I think that some of the sentences proposed by the guidelines are much too high, but I do believe the principle that a repeat offender has to be treated with that in mind. That is one of the problems for me.

MR. WELSH: But, I guess if you take that, as opposed to the fact he's been cooperating for 18 months --

THE COURT: I think they might trade each other off.

MR. WELSH: Yes, yes. I would point out the original theory in this case was that he somehow had recruited Del Rosario and Espinal, but as you read through the offense conduct, that doesn't seem to be borne out. These people all knew one another from the Dominican Republic. He didn't have to come in and introduce anybody. He was not really a middle man. The government actually is recommending 120 months, as I understand it, but that would be the longest sentence of any of them that have been before you.

THE COURT: Yes, it would.

MR. WELSH: Isidro got 97 months, and he was the

organizer, so if you gave 120 months, that would be two years longer.

THE COURT: The reason for the difference would be the career offender.

MR. WELSH: Again, if you take into consideration the cooperation that he's done, I think you can take that into consideration. I grant you that he qualifies as a career criminal, but I argue to you that the 5(k) offsets that. I would ask that you consider the family history that Aura has just indicated to you.

THE COURT: I certainly do.

MR. WELSH: The hardship that will create. He's almost certainly to be deported, and even when he finishes his Federal sentence, he still has to make his peace with the Massachusetts court, the New York court and the Connecticut court, so —

THE COURT: That will keep you busy for the rest of your career.

MR WELSH: Well, I'm not sure of that or how long my career has still got to go, Judge. He has been detained since February 5th, according to the pre-sentence report. I would ask he be given credit for time served from that day.

THE COURT: Of course.

MR. WELSH: I have discussed with the probation department he would be like to be considered for the 500 hour

drug program.
THE COURT: I'm ready to recommend that.
MR. WELSH: And, finally, I would ask you for his common law wife's sake and his children's sake, if you would consider at least making a recommendation he serve his Federal sentence at Fort Devins.
THE COURT: I would, but I'm not sure how much that would help.
MR. WELSH: Finally, in answer to your question, I know the government is recommending 120 months. I know we're facing a minimum mandatory of 60 months. I would ask that you consider 60 months and/or some period between the 60 months that I'm recommending and the 120 months that the government is recommending.
THE COURT: Very good. Well, let's hear from Mr. Hernandez. Mr. Hernandez, would you stand, please. Mr. Hernandez, you have the right to tell me anything you wish at this time, and I would like to hear from you. It's more important for me to hear from the defendants than their lawyer, even though you have a very good lawyer, so tell me whatever you want.
THE WITNESS: Well, I want to explain that what I did was —— how can I explain it? It was an accident, because I was trying to do a favor for my cousin, and I didn't know the law. I was trying to do a favor for my cousin. What I did

was my cousin asked me to take that guy to the airport, and because I didn't know the law, I took him, but I ask your forgiveness for that, and I ask you take into account my mother's situation, whether you could give me the minimal participation, because I really -- I didn't get any money out of that. All I did was do that favor. I never received one cent or anything. I also have here that I'm sentenced by an immigration judge, and if you can consider that.

THE COURT: I'm sorry. Would you repeat that?

THE WITNESS: That I've already been sentenced by an immigration judge, and would you consider that, because I don't qualify for probation or anything, because I'm going to be deported. This is the sentence of the judge.

THE COURT: All right. Very good.

Mr. Hernandez, I've given a great deal of thought to your case, so have Mr. Welsh and Ms. Poswistilo, and I know you. I've been thinking about it a long time, and I was glad to hear what your wife had to say, and I wish that I was entirely free to do what you're asking, but I am not entirely free just to say God bless you, you can go home. I'm bound by what are called the sentencing guidelines, which say that I must sentence you within certain parameters.

Now, one of the problems here is that this is not your first offense, and that does make your case different from that of the others in this case. You have been

classified as what is called a career offender, which means that if the government had not recognized your cooperation, you would face a sentence of between 151 months and 180 months. The government does recognize your cooperation and says that it recommends that the sentence be reduced to 120 months. Mr. Welsh asked me to go down to 60 months. I cannot conscientiously do that, but I am prepared to go ahead and sentence as follows: Pursuant to the Sentencing Reform Act of 1994, it is the judgment of the Court that the defendant, Pedro Jose Hernandez, is hereby committed to the custody of the Bureau of Prisons, to be imprisoned for a term of 100 months. Upon release from prison, the defendant shall be placed on supervised release for a term of three years. Within 72 hours of release from custody from the Bureau of Prisons, the defendant shall report in person to the district to which the defendant is released. While on supervised release, the defendant shall not commit another crime. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release and at least two periodic drug tests thereafter. In addition, the defendant shall comply with the standard conditions that are described in the sentencing guidelines and the special conditions of not possessing a

firearm or other dangerous weapon.
The defendant is to participate in a program for substance abuse, as directed by the United States Probation Office, which program may include testing to determine whether the defendant has reverted to the use of alcohol or drugs.
The defendant shall be required to contribute to the cost of services for such treatment, based on his ability to pay or availability of third-party payment.
The defendant is not to consume any alcoholic beverages, and if ordered deported, as apparently you will be, the defendant is to leave the United States and not return without prior permission of the United States Attorney General.
The defendant shall use his true name and will be prohibited from using any aliases, false names, false dates of births, Social Security number, place of birth or any other incorrect identifying information.
It is further ordered that the defendant shall pay the United States a special assessment of $100, which shall be due immediately.
It is recommended that, at the defendant's request, that he be assigned to the 500-hour drug rehabilitation program, if he is eligible, and that he be held in custody, if possible, by the Bureau of Prisons at Fort Devins; or, if not, at a facility as near as possible to this

location so that his family can visit him when they are able to do so.
I want Mr. Hernandez to understand that he has a right to appeal this sentence, and if he wishes to do so, it must be done within ten days, and Mr. Welsh will arrange for the appeal.
I'm sorry I had to read at such great length, but all these things have to be part of the proceedings here.
Mr. Hernandez, I would like to give you a chance for the future. I'm impressed by what your wife had to say.
I know that you want to be a good man and a good father.
I don't believe that I would be doing my duty if I imposed a sentence lower than I did. While a hundred months is eight years, you already have credit for one year. You'll get credit for another year or so during the period of time that you're in custody, and so it will be reduced, actually, to something more like six years, I hope, I believe.
Now, I know the children will be growing in the meantime, and it's a tough world, but I wish you well, and I'm not going to say any more. Thank you all.
THE CLERK: All rise. Court is now in recess.
(Hearing concluded at 3:01 p.m.)

CERTIFICATION

I certify that the foregoing is a correct transcript of the record of proceedings in the above—entitled matter, to the best of my skill and ability.

Janet M. Konarski
JaneM. Konarski
Official Court Reporter

9/30/02
Date

A3

Judgment of the United States District Court for the District of Massachusetts
United States v. Pedro Jose Hernandez
Docket No. 01-10013
Issued by Judge Morris E. Lasker
Entered on August 29, 2002

AO 245B Sheet 1 - Judgment in a Criminal Case - D. Massachusetts (10/01)

United States District Court
District of Massachusetts

UNITED STATES OF AMERICA
v.
PEDRO JOSE HERNANDEZ

JUDGMENT IN A CRIMINAL CASE

(For Offenses Committed On or After November 1, 1987)

Case Number: 1 01-cr-10013-003-MEL

Richard M. Welsh
Defendant's Attorney

THE DEFENDANT:
_X_ pleaded guilty to count(s): 1
___ pleaded nolo contendere to counts(s)_____
which was accepted by the court.
___ was found guilty on count(s)_____
after a plea of not guilty.

Accordingly, the court has adjudicated that the defendant is guilty of the following offense(s):

Title & Section	Nature of Offense	Date Offense Concluded	Count No.(s)
21USC § 963	Conspiracy to import heroin.	08/26/99	1

__see continuation page

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

__The defendant has been found not guilty on counts(s) and is discharged as to such count(s).

__Count(s) _____ is dismissed on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court and United States Attorney of any material change in the defendant's economic circumstances.

Defendant's Soc. Sec. No.: 000-00-2519
Defendant's Date of Birth: *00/00/71*
Defendant's USM No.: 23517-038
Defendant's Residence Address:
Plymouth House of Correction
26 Long Pond Rd.,Plymouth, Ma.02360
Defendants Mailing Address:
Same as above

08/21/02
Date of Imposition of Judgment

s Morris E. Lasker
Signature of Judicial Officer

The Honorable Morris E. Lasker
Name and Title of Judicial Officer

Senior Judge, U.S. District Court
Date 08/22/02

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 100 month(s)

Credit for time served from 02/05/01

__X__ The court makes the following recommendations to the Bureau of Prisons:

1.That the defendant be imprisoned at FMC Fort Devins or another facility near his family to facilitate visitation.

2.That the defendant should participate in the *500* hour drug rehabilitation program if he is eligible.

_X_ The defendant is remanded to the custody of the United States Marshal.

___ The defendant shall surrender to the United States Marshal for this district:

___at_____ on _____

___as notified by the United States Marshal.

___The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

___ before _____ on _____

___ as notified by the United States Marshal.

___ as notified by the Probation or Pretrial Services Officer.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____

to _____

_____ with a certified copy of this judgment.

_____

United States Marshal

By _____

Deputy U.S. Marshal

SUPERVISED RELEASE

Upon release from Imprisonment, the defendant shall be on supervised release for a term of 3 year(s) I .The defendant is prohibited from possessing a firearm or other dangerous weapon.

_X_ see continuation page

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13,1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from Imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

____The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. (Check if applicable.)

_X_ The defendant shall not possess a firearm, destructive devlce, or any other dangerous weapon.

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page (If Indicated above).

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4) the defendant shall support his or her dependants and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training or other acceptable reasons:
6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment:
7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8) the defendant shall not frequent places where controlled substances are Illegally sold, used, distributed, or administered:

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer:

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer:

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter Into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court:

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

Continuation of Conditions of _x_ Supervised Release
___ Probation

2. The defendant is to participate in a program for substance abuse as directed by the United States Probation Office, which program may include testing to determine whether the defendant has reverted to the use of alcohol or drugs. The defendant shall be required to contribute to the costs of services for such treatment based on the ability to pay or availability of third party payment.

3. The defendant is not to consume any alcoholic beverages.

4, If ordered deported, the defendant is to leave the United States and is not to return without prior permission of the United States Attorney General.

5. The defendant shall use his true name and will be prohibited from using any alliases, false dates of birth, social security numbers, places of birth, or any other pertinent, incorrect identifying information.

AO 245B Judgment in a Criminal Case - 1). Massachusetts
(10/01)Sheet 5, Part A — Criminal MonetaryPenalties
CASE NUMBER: 1: 01-cr~10013-003-MEL Page 5 of 6
DEFENDANT: PEDRO JOSE HERNANDEZ

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5, Part B.

	Assessment	Fine	Restitution
TOTALS	$100.00		

____The determination of restitution is deferred until . An Amended Judgment in a Criminal Case (AO 245C) will be entered after such determination.

_____The defendant shall make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid in full prior to the United States receiving payment.

Name of Payee	*Total Amount of Loss	Amount of Restitution Ordered	Priority Order or Percentage of Payment
TOTALS	$0.00	$0.00	

___see continuation page

_____ If applicable, restitution amount ordered pursuant to plea agreement. _____

_____The defendant shall pay interest on any fine or restitution of more than *$2,500,* unless the fine or restitution is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet *5,* Part B may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

___.The court determined that the defendant does not have the ability to pay interest, and it is ordered that:
_____ the interest requirement is waived for the ___ fine and/or ___ restitution.
_____ the interest requirement for the fine and/or
_____restitution is modified as follows:

* Findings for the total amount of losses are required under Chapters 109A, 110, 1 lOA, and 11 3A of Title 18, United States Code, for offenses committed on or after September 13, 1994 but before April 23, 1996.

DEFENDANT: PEDRO JOSE HERNANDEZ

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties shall be due as follows:
A. _X_ Lump sum payment of $100.00 due immediately, balance due

___not later than _____,or
___in accordance with U C, LI D, or El E below; or

B. _____Payment to begin immediately (may be combined with C, D, or E below); or

C. _____Payment in _____ (e.g., equal, weekly, monthly, quarterly) installments of _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or

D. ____ Payment in _____ (e.g., equal, weekly, monthly, quarterly) installments of _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E. _____Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise in the special instruction above, if this judgment imposes a period

of imprisonment, payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court, unless otherwise directed by the court, the probation officer, or the United States attorney.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

_____ Joint and Several

Case Number, Defendant Name, and Joint and Several Amount:

___see continuation page

____ The defendant shall pay the cost of prosecution.

____The defendant shall pay the following court cost(s):

____The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (I) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) community restitution, (6) fine interest (7) penalties, and (8) costs, including cost of prosecution and court costs.

A4

Judgment of the United States Court of Appeals for the First Circuit
United States v. Pedro Jose Hernandez
Docket No. 02-2127
Entered on January 19, 2005

01-10013
USDC-MABO
J. LASKER

MANDATE
United States Court of Appeals
For the First Circuit

No. 02—2127

UNITED STATES,

Appellee,

v.

PEDRO JOSE HERNANDEZ,

Defendant, Appellant.

Before

Boudin, Chief Judge,
Lipez and Howard, Circuit Judges.

JUDGMENT

Entered: January 19, 2005

In orally announcing a drug testing condition of supervised release, the court directed defendant to "submit to one drug test within 15 days of release and at least two periodic drug tests thereafter." This oral pronouncement controls over the somewhat differently worded written judgment, which expressly (and impermissibly) delegated determination of the number of tests to probation. In conformity with United States v. Lewandowski, 372 F.3d 470 (1st Cir. 2004), we construe the quoted language as limiting the number of tests that probation may order to the mandatory minimum three tests. As construed, there is no improper delegation of authority. As in Lewandoski, the three test limit "does not affect the number of drug tests that may be ordered in consequence of the treatment program that [Hernandez] must attend while on supervised release." Lewandowski, 372 F.3d at 471.

The judgment, as modified and construed in this opinion, is summarily affirmed.

Certified and Issued as Mandate under Fed. R. App. R 41.
Richard Cushing Donovan, Clerk

s/ K. L. Candryo (?)
Deputy Clerk
Date: 2/9/05

By the Court:
Richard Cushing Donovan, Clerk.

By: s/ MARGARET CARTER
Chief Deputy Clerk

[cc: Susan M. Poswistilo, AUSA, Dma Michael Chaitowitz, AUSA, Virginia M. Vander Jagt, AUSA, Michael A. Tucker, Esq.]

A5

Relevant Provisions of 18 U.S.C. § 3553 (a) and (b).

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18 USCS § 3553(a) and (b)

§ 3553 (a). Imposition of a sentence

Factors to be considered in imposing a sentence. The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider--

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed--

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for--

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines--

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g) 18 USCS § 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or

supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement--

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g) 18 USCS § 3742(g), is in effect on the date the defendant is sentenced.

(6) the need to avoid unwarranted sentence disparities

among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

§ 3553 (b). Application of guidelines in imposing a sentence.

(1) In general.

Except as provided in paragraph (2), the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission. In the absence of an applicable sentencing guideline, the court shall impose

an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission.

(2) Child crimes and sexual offenses.

[(A)] Sentencing. In sentencing a defendant convicted of an offense under section 1201 18 USCS § 1201 involving a minor victim, an offense under section 1591 18 USCS § 1591, or an offense under chapter 71, 109A, 110, or 117 18 USCS §§ 1460 et seq., 2241 et seq., 2251 et seq., or 2421 et seq., the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless--

(i) the court finds that there exists an aggravating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in

formulating the guidelines that should result in a sentence greater than that described;

(ii) the court finds that there exists a mitigating circumstance of a kind or to a degree, that--

(I) has been affirmatively and specifically identified as a permissible ground of downward departure in the sentencing guidelines or policy statements issued under section 994(a) of title 28, taking account of any amendments to such sentencing guidelines or policy statements by Congress;

(II) has not been taken into consideration by the Sentencing Commission in formulating the guidelines; and

(III) should result in a sentence different from that described; or

(iii) the court finds, on motion of the Government, that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense and that this assistance established a mitigating circumstance of a kind, or to a degree, not

adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence lower than that described.

In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission, together with any amendments thereto by act of Congress. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission, together with any amendments to such guidelines or policy statements by act of Congress.

A6

Relevant Provisions of 18 U.S.C. § 3742(e).

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18 USCS § 3742 (e)

Consideration.

Upon review of the record, the court of appeals shall determine whether the sentence--

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines;

(3) is outside the applicable guideline range, and

(A) the district court failed to provide the written statement of reasons required by section 3553(c) 18 USCS § 3553(c);

(B) the sentence departs from the applicable guideline range based on a factor that--

(i) does not advance the objectives set forth in section 3553(a)(2) 18 USCS § 3553(a)(2); or

(ii) is not authorized under section 3553(b) 18 USCS § 3553(b); or

(iii) is not justified by the facts of the case; or

(C) the sentence departs to an unreasonable degree from the applicable guidelines range, having regard for the factors to be considered in imposing a sentence, as set forth in section 3553(a) of this title 18 USCS § 3553(a) and the reasons for the imposition of the particular sentence, as stated by the district court pursuant to the provisions of section 3553(c) 18 USCS § 3553(c); or

(4) was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable. The court of appeals shall give due regard to the opportunity of the district court to judge the credibility of the witnesses, and shall accept the findings of fact of the district court unless they are clearly erroneous and, except with respect to determinations under subsection (3)(A) or (3)(B), shall give due deference to the district court's application of the guidelines to the facts. With respect to determinations under

subsection (3)(A) or (3)(B), the court of appeals shall review de novo the district court's application of the guidelines to the facts.

A7

Rule 11 Hearing of United States District Court for the District of Massachusetts

United States v. Pedro Jose Hernandez

Docket No. 01-10013

Before Judge Morris E. Lasker

Held on November 27, 2001

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

* *

UNITEDSTATES OF AMERICA,
Plaintiff,

vs. Criminal Action
No. 01—CR—10013

JESUS HERNANDEZ, ET AL.,
Defendants.

* *

BEFORE THE HONORABLE MORRIS E. LASKER
SENIOR JUDGE, U.S. DISTRICT COURT
RULE 11 HEARING
November 27, 2001

Courtroom No. 8
U.S. District Court
1 Courthouse Way
Boston, Massachusetts 02210

Deborah L. Crossman, RPR
Official Court Reporter
3507 United States Courthouse
Boston, Massachusetts 02210

APPEARANCES:

UNITED STATES ATTORNEY'S OFFICE (by Susan M. Poswistilo, Esq.) One courthouse Way, Boston, Massachusetts 02210, on behalf of the Government

RICHARD M. WELSH, ESQ., 80 Worcester Street, North Grafton, Massachusetts 01536, on behalf of the Defendant Pedro Jose Hernandez

PROCEEDINGS

THE CLERK: This is Criminal 01—10013, United States of America versus Pedro Jose Hernandez. Would the attorneys please identify themselves and who they represent for the Court.

MS. POSWISTILO: Good morning, Your Honor, Susan Poswistilo for the United States.

THE COURT: Thank you.

MR. WELSH: Good morning, Your Honor, Richard Welsh for the defendant.

MARGARITA CARDENAS, INTERPRETER, SWORN

THE CLERK: Please be seated. Give your full name, spelling your last.

THE INTERPRETER: Margarita Cardenas, C-A-R-D-E-N--A-S.

THE COURT: Thank you very much, ma'am. Good morning. We are here, as I understand it, because Mr. Hernandez has decided he wishes to plead guilty and has entered into a plea agreement with the government. Is that correct, Mr. Welsh?

MR. WELSH: That is correct, Your Honor.

THE COURT: Right. And may I ask you a few questions? How long have you represented Mr. Hernandez in this case?

MR. WELSH: Actually, I was originally

appointed -- I don't have the date with me --
THE COURT: Is it close to a year or something like that?
MR. WELSH: Oh, at least, yes.
THE COURT: I see. And how much time would you estimate you spent reviewing the case with him?
MR. WELSH: I've met with him both when he was in state confinement and down in Plymouth. I would say six or eight times at least.
THE COURT: Are you satisfied that he understands the nature of the charge to which he proposes to plead guilty?
MR. WELSH: I am satisfied.
THE COURT: And are you satisfied that if you went to trial on that charge the government would probably prevail?
MR. WELSH: I'm satisfied that the government would be able to produce sufficient evidence which I believe by the jury would sustain a verdict of guilty.
THE COURT: All right. Are you satisfied that he understands the maximum penalty that could be imposed in the case of an acceptance of a plea?
MR. WELSH: I've gone over that with him in detail, Your Honor.

THE COURT: All right. Now, I want to ask one other question I don't normally ask. I think we had a previous proceeding in which it was believed Mr. Hernandez would plead guilty and then he changed his mind. Are you satisfied that he now has resolved the doubts in his mind and wishes to proceed as indicated?
MR. WELSH: I've gone over it with him in detail. I've provided him with a letter in which I've explained all of his options. And after much consideration he came to the conclusion that he wished to plead guilty.
THE COURT: Very good. Thank you, sir.
THE COURT: Mr. Hernandez, would you stand. Mr. Hernandez, good morning.
THE DEFENDANT: Good morning.
THE COURT: How are you feeling today?
THE DEFENDANT: Okay.
THE COURT: Okay. You've been here once before before me; right?
THE DEFENDANT: Yes.
THE COURT: You have now, as I understand it, changed your mind and feel that you wish to plead guilty to count one of the indictment; is that right?
THE DEFENDANT: (Through the interpreter) Yes.

THE COURT: Okay. Mr. Hernandez, how old are you?
THE DEFENDANT: 30.
THE DEFENDANT: (Through the interpreter) 30.
THE COURT: And how much school have you had?
THE DEFENDANT: (Through the interpreter) Six.
THE COURT: Sixth grade? Where did you go to school?
THE DEFENDANT: (Through the interpreter) In Santa Domingo.
THE COURT: Can you read and write?
THE DEFENDANT: (Through the interpreter) Not perfectly. I can read and write but not too well.
THE COURT: I see. Okay. Are you in good health?
THE DEFENDANT: (Through the interpreter) Yes. Right now I am.
THE COURT: That's good. Have you ever been addicted to drugs or alcohol?
THE DEFENDANT: (Through the interpreter) Yes.
THE COURT: Is that in the past now? How

long have you been in custody?
THE DEFENDANT: (Through the interpreter) Well, now I've been here about 10 months
THE COURT: I see. Okay. Are you under the influence of any drug or sedative right at this moment?
THE DEFENDANT: (Through the interepreter) No.
THE COURT: Are you thinking clearly?
THE DEFENDANT: (Through the interpreter) Yes.
THE COURT: Okay. Now, Mr. Welsh tells me and Ms. Poswistilo that you wish to plead guilty to count one of the indictment. I believe that is a conspiracy count; is that right?
MS. POSWISTILO: Yes, Your Honor.
THE COURT: And that charges you with agreeing with other people to import illegal drugs into this country. Is that the charge you wish to plead guilty to?
THE DEFENDANT: (Through the interpreter) Yes.
THE COURT: Would you tell me in your own words just what you did that makes you guilty of that charge?

THE DEFENDANT: (Through the interpreter) Exactly, I wanted to tell you. I made a mistake. My cousin called me and asked me for a favor. He asked me to take some people -- I knew where he lived in Connecticut, and he wanted me to help him take them to the airport. But I never worked with my cousin. I never charged a cent. I never received a cent for that kind of business.

THE COURT: So what did you agree to do with your cousin?

THE DEFENDANT: (Through the interpreter) He called me and asked me to do him the favor of taking the people to his house and to the airport because he couldn't do it and they didn't know the way. And I knew the people, and I knew where the airport was.

THE COURT: Did you know that there were drugs involved in this?

THE DEFENDANT: (Through the interpreter) I knew that my cousin was involved in that because he had talked about it.

THE COURT: All right. I think it's difficult for Mr. Welsh to give me the details here, but what I'd like to do is ask the government attorney if she would briefly describe the evidence that she believes the government could produce at trial with

regard to count one and Mr. Hernandez. And then, Mr. Hernandez, I'm asking you to listen to what she says and I want to know if you agree with what she says. All right?

MS. POSWISTILO: Certainly, Your Honor.

THE COURT: Thank you.

MS. POSWISTILO: Your Honor, if the case were to go to trial, the government would show that on August 26th of 1999, two individuals were arrested in Houston coming from Ecuador and that these individuals had swallowed approximately 110 pellets containing heroin and that the total amount of heroin that these individuals carried was approximately 995 grams of heroin.

The evidence would show that these two individuals both had ties and lived in Massachusetts -- in Massachusetts -- up in the Lynn, Massachusetts area, that one of the individuals was brought into the group by one of the co-defendants in this case, Juan Espinal. At the time Pedro Jose Hernandez and Mr. Espinal were together, the evidence would show that Mr. Espinal, Mr. Hernandez and the individual by the name of Victor Balbuena, one of the persons arrested, met and talked about Mr. Balbuena taking a trip to Ecuador for the purposes of importing drugs.

The evidence would show that Mr. Hernandez -- Pedro Jose Hernandez actually did participate in the conversation. He talked to Mr. Balbuena regarding how much payment Mr. Balbuena would receive if he agreed to take that trip and that Mr. Hernandez expected some amount of payment from Balbuena if, in fact, he agreed to take the trip

The evidence would show on August 12th of 1999, was which the day Mr. Balbuena and the other swallower -- Mr. Balbuena and the other swallower, Betty Ann Rodriguez left -- backing up a bit, the evidence would show that on that day of the trip that Mr. Hernandez met with Mr. Balbuena and other individuals, including Betty Ann Rodriguez, for the purpose of driving the individuals from Massachusetts to Connecticut and eventually to the airport so that they could depart for this trip to Ecuador, that Mr. Hernandez did, in fact, accompany them, brought them to an apartment in Connecticut where they met up with another co-defendant, Jesus Hernandez. Jesus Hernandez divided the two travelers, Mr. Balbuena and Ms. Rodriguez, money to give to his brother in Ecuador and whatnot and that they all then eventually went to the airport to bring them --

THE COURT: I think that's sufficient for

our purposes.
Mr. Hernandez, did you hear what Ms.
Poswistilo said?
THE DEFENDANT: (Through the interpreter)
heard some of it.
THE COURT: As I understand it, she said
the government could establish that you agreed to drive
these people and you knew that there were drugs involved
and that you expected to be paid something, although you
tell me you haven't been paid anything.
THE DEFENDANT: (Through the interpreter) I
did take them, as I said. But I never received any
money, and I never expected to receive any money. But I
did take them.
THE COURT: But you did know there were
drugs involved?
THE DEFENDANT: (Through the interpreter) I
did know because my cousin had talked to me about that.
But what I was doing was simply a favor that he asked me
-- that they asked me.
THE COURT: All right. Thank you.
Now, I want to be sure, Mr. Hernandez, that
you understand what the possible penalties can be in
case like this. As you probably know from speaking to
Mr. Welsh and maybe to other prisoners, there are two

systems for penalties: One is the law passed by Congress, and the other is what is called the guidelines
Under the law passed by Congress, there's a possible penalty of 20 years in prison and a fine of $1 million and three years' of supervised release and a special assessment of $100. I'm not saying--go ahead.
THE DEFENDANT: (Through the interpreter) Please tell them I am a Dominican and so I wouldn't qualify for that release. I'm in the hands of Immigration. I've already been sentenced by an Immigration Judge
THE COURT: I understand that you are a Dominican, and I was about to add as a result of that fact whatever time is imposed, you may very well face deportation. And I'm sure you're aware of that.
Now, I also want you to understand that although I have authority to sentence you at a rate lower than the maximum here, you do face the possibility of what's called a mandatory minimum. That is, depending on how much was involved in this case, you may face a sentence of a minimum of 10 years or a minimum of five years. And I cannot say at the moment what that will be. Do you understand that?
THE DEFENDANT: (Through the interpreter)

Yes. I just want you to know that if Chao (ph) said he was going to pay me money, he's lying because he never offered to pay me money. And I was never present in the business deal

THE COURT: Well, I'm glad to know that, and I'll take that into consideration if I find that to be the fact.

Now, Mr. Hernandez, let me ask you a few more questions. I want to be sure that you understand what your rights are under American law before I accept your plea of guilty. You do not have plead guilty to this charge. Do you understand that?

THE DEFENDANT: (Through the interpreter) Yes.

THE COURT:You have the right to go to trial. If you went to trial, you would be represented by your attorney, Mr. Welsh. He would have the right to question the witnesses against you; and you could testify, if you wished to, or you could not testify if you didn't want to. And if you wanted, I'd tell the jury you didn't have to testify.

If I accept your plea of guilty, you understand therewill be no trial. Now, if you were tried by a jury, in order to be convicted, the government would have to prove its case beyond a

reasonable doubt. And all of the jurors would have to agree that you're guilty. Do you understand that?
THE DEFENDANT: (Through the interpreter) Yes.
THE COURT: If I accept your plea of guilty, I can impose the same penalty as could be imposed as if you were found guilty by the jury. Do you understand that?
THE DEFENDANT: (Through the interpreter) Yes.
THE COURT: All right. Just a few more q questions. Mr. Hernandez, has anybody told you -- has anybody pressured you to make you plead guilty to this charge?
THE DEFENDANT: (Through the interpreter) No.
THE COURT: Are you doing so of your own free will?
THE DEFENDANT: (Through the interpreter) Yes.
THE COURT: And tell me why you've decided to plead guilty now because I know you were not sure about that before.
THE DEFENDANT: (Through the interpreter) I had not gone over my papers carefully enough, and I

wasn't well enough aware of my accusations.
THE COURT: Thank you for that answer.
MR. WELSH: I should point out to Your Honor that Your Honor permitted all the transcripts for the grand jury testimony translated to Spanish and given to him. And I think that assisted him to reach his conclusion.
THE COURT: Very good. You can be seated now.
I'm satisfied that Mr. Hernandez is in good health and has clear thinking, that even though he has not had much education, he understands the nature of the charge against him here and the nature of the agreement he has signed with the government. I am satisfied that there's a factual basis for his plea of guilty and that he has intelligently and voluntarily waived his right to a jury trial. And I'll accept the plea, and we'll set a date for sentencing.
THE CLERK: Sentencing will be February 14, 2002 at 2:15.
THE COURT: Very good. And since Mr. Hernandez is in custody --you understand, Mr. Hernandez, that you will be given credit for time served already. Do you have a question? I see you raising your hand.

THE DEFENDANT: (Through the interpreter) I am willing to cooperate with you, and I am unable to take you to the people who are the real responsible ones for this.

THE COURT: Well, that's to be arranged between your attorney and the attorney for the United States government. And that certainly will be taken into consideration at the time of sentencing.

MR. WELSH: I would just add, if I may, when he was originally indicted, he was being held pending a state matter. And then eventually I understand that the state matter was disposed of, and that's when he was transported down to Plymouth. So I'm not exactly sure how much time he's going to get credit for. We'll have to get that sorted out between us.

MS. POSWISTILO: That's correct, Your Honor.

THE COURT: Well, I don't know about how much time he will be legally credited for. That is something I will personally take into consideration in sentencing.

MR. WELSH: Very good. Thank you.

THE CLERK: All rise. Court is now in recess.

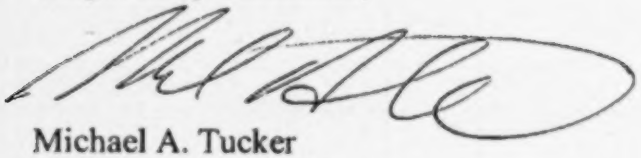
(Whereupon the proceedings adjourned.)

CERTIFICATE

I, Deborah L. Crossman, Official Court Reporter for the United States District Court for the District of Massachusetts, do hereby certify that the foregoing pages are a true and accurate transcription of my shorthand notes ability.

S/ Deborah L. Crossman, RPR
Deborah L. Crossman, RPR
Official Court Reporter
3507 United States Courthouse
One Courthouse Way
Boston, Massachusetts 02210
(617) 439-9190

Respectfully Submitted,



Michael A. Tucker
Griffin & Tucker, P.C.
24R Pleasant Street
Newburyport, MA 01950
(978) *465-3590*
Counsel of Record for Petitioner